Supreme Court, U.S.
FILED
98 18 05 MAY 7 1999
OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GAIL MERCHANT IRVING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

Matthew B. Cox
Counsel of Record
Paul R. Cox
BURNS, BRYANT, HINCHEY, COX & ROCKEFELLER, P.A.
255 Washington Street
Dover, NH 03821-0608
(603) 742-2332

Leslie A. Brueckner
Arthur H. Bryant
TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.
1717 Massachusetts Ave., NW,
Suite 800
Washington, D.C. 20036
(202) 797-8600

Attorneys for Petitioner

Balmar Legal Publishing Services, Washington, DC (202) 682-9800

27388

QUESTIONS PRESENTED

This Federal Tort Claims Act (FTCA) case arises from a gruesome 1979 workplace accident which, the trial court found, was caused by the negligence of OSHA inspectors. Almost nineteen years later, on April 8, 1998, after two trials and four separate appeals, a First Circuit panel entered final judgment in favor of Irving. Two months later, on June 8, 1998, although neither party had requested further review or relief of any kind, the First Circuit inexplicably recalled the mandate *sua sponte*. After a fifth briefing and oral argument, the First Circuit issued a divided (5-2) en banc opinion reversing the judgment and dismissing the case under the "discretionary function exception" to the FTCA, a defense which the government had formally waived. The highly critical, 50-page dissent condemned the majority opinion as, *inter alia*, a "fundamental misconstru[ction]" of the seminal FTCA test set forth by this Court in *Berkovitz v. United States*, 486 U.S. 531 (1988).

1. Does the First Circuit's *sua sponte* recall of its mandate violate this Court's recent teaching in *Calderon v. Thompson*, 118 S. Ct. 1489 (1998), that a mandate may only be recalled in "extraordinary circumstances" to protect against "grave, unforeseen contingencies"?

2. Did the Court of Appeals err in "fundamentally misconstru[ing] controlling Supreme Court precedent [*Berkovitz*] in analyzing the discretionary function exception" as charged in the powerful dissent?

3. Did the Court of Appeals err in reviewing the discretionary function defense *sua sponte* notwithstanding the Government's formal waiver thereof?

PARTIES TO THE PROCEEDINGS

To the best of Petitioner's knowledge, the caption contains all of the parties to this action.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS IN THE CASE 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 14

1. The First Circuit's Unexplained and *Sua Sponte* Recall of the Panel Decision in Petitioner's Favor Violates this Court's Teaching in *Calderon* and Constitutes Such a Departure from Accepted Judicial Procedures as to Warrant Review By this Court..... 15

2. The First Circuit Resolved the Discretionary Function Question in a Manner Directly in Conflict with the Seminal Case of *Berkovitz*..... 19

3. The First Circuit Improperly Undertook a *Sua Sponte* Review of the

Discretionary Function Issue Notwithstanding the Government's Formal Concession with Respect Thereto 23

CONCLUSION 26

APPENDIX

TABLE OF CONTENTS 29

Appendix A
First Circuit en banc opinion, 12/18/98 ..... A-1

Appendix B
First Circuit *sua sponte* recall order, 6/8/98 ..... B-1

Appendix C
First Circuit panel opinion, 4/8/98 ..... C-1

Appendix D
First Circuit order denying rehearing, 2/9/99 ..... D-1

Appendix E
District Court decision on merits, 8/29/96 ..... E-1

Appendix F
First Circuit panel opinion, 3/16/95 ..... F-1

Appendix G
First Circuit panel opinion, 7/25/90 ..... G-1

TABLE OF AUTHORITIES

Cases

Berkovitz v. United States,
486 U.S. 531 (1988) ..... i, 6, 7, 17, 19, 21, 22

Block v. Neal,
460 U.S. 289 (1983) 17, 25

Calderon v. Thompson,
118 S. Ct. 1489 (1998) 14, 16, 18

Dalehite v. United States,
364 U.S. 15 (1953) 6, 22

Hazel-Atlas Glass Co. v. Hartford-Empire Co.,
322 U.S. 238 (1944) 15

Indian Towing Co. v. United States,
350 U.S. 61 (1955) 17, 18, 25

Irving v. United States,
532 F. Supp. 840 (D.N.H. 1982) 6

Irving v. United States,
909 F.2d 598 (1st Cir. 1990) 7, 8, 24

Irving v. United States,
49 F.3d 830 (1st Cir. 1995) 24

Irving v. United States,
942 F. Supp. 1483 (D.N.H. 1996) 5, 10, 18, 20

Irving v. United States,
No. 96-2368, 1998 WL 152941
(1st Cir. April 8, 1998) 25

Irving v. United States,
146 F.3d 12 (1st Cir. 1998) 11, 15, 16

Irving v. United States,
162 F.3d 154 (1st Cir. 1998) 10, 17

Irving v. United States, Nos. 96-2368/96-2369
(1st Cir. February 9, 1999) 11, 19

Meeks v. Georgia, S. & F. R. Co.,
377 U.S. 405 (1964)..... 19

United States v. Gaubert,
499 U.S. 315 (1991) 20, 25

United States v. Ohio Power Co.,
353 U.S. 98 (1957) 16

United States v. Varig Airlines,
467 U.S. 797 (1984) 6, 25

Statutes, Rules and Regulations

28 U.S.C. § 1254(1) 2

Federal Tort Claims Act, 28 U.S.C. §§ 1346(b),
2671-2680 ..... 2, 3, 5

Supreme Court Rule 10 ..... 15, 23, 25

Supreme Court Rule 16 19

Federal Rule of Appellate Procedure 40 ..... 11, 14

Federal Rule of Appellate Procedure 41 ..... 11, 12

OPINIONS IN THE CASE

1. *Irving v. United States*, 532 F. Supp. 840 (D.N.H. 1982).

2. *Irving v. United States*, No. 88-1454 (1st Cir. Dec. 7, 1988)(unpublished order) [867 F.2d 606].

3. *Irving v. United States*, 909 F.2d 598 (1st Cir. 1990)(App. G-1).[1]

4. *Irving v. United States*, No. C81-501-SD, 1994 WL 287750 (D.N.H. June 6, 1994)(unpublished order on the merits).

5. *Irving v. United States*, No. C81-501-SD, 1994 WL 392614 (D.N.H. July 28, 1994) (unpublished order denying reconsideration).

6. *Irving v. United States*, 49 F.3d 830 (1st Cir. 1995)(App. F-1).[2]

7. *Irving v. United States*, 942 F. Supp. 1483 (D.N.H. 1996)(App. E-1).[3]

8. *Irving v. United States*, No. 96-2368,1998 WL 152941 (1st Cir. April 8, 1998) (panel opinion recalled prior to publication)(App. C-1).

---

[1] Because this was the first *reported* decision of the First Circuit, the courts have referred to this opinion as "*Irving I*".
[2] This decision has become known as "*Irving II*".
[3] The courts have labeled this opinion "*Irving III*".

9. *Irving v. United States*, 146 F.3d 12 (1st Cir. 1998)(App. B-1).

10. *Irving v. United States*, 162 F.3d 154 (1st Cir. 1998)(App. A-1).

11. *Irving v. United States*, Nos. 96-2368/96-2369 (1st Cir. February 9, 1999)(unpublished order denying Irving's petition for rehearing)(App. D-1).

JURISDICTION

This Court has jurisdiction to review the decisions of the First Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1). The district court entered judgment in Irving's favor on August 29, 1996. App. E-1. A panel of the First Circuit upheld the district court by order dated April 8, 1998. App. C-1. However, the mandate relative to the panel decision was recalled *sua sponte* by order dated June 8, 1998. App. B-1. By opinion dated December 18, 1998, the district court was reversed by the First Circuit sitting en banc. App. A-1. The First Circuit denied Irving's petition for rehearing on February 9, 1999 (App. D-1), and this Petition for Writ of Certiorari was timely filed within 90 days thereof.

STATUTORY PROVISIONS INVOLVED

Federal Tort Claims Act
28 U.S.C. § 1346(b)

"... the district courts shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to t e claimant in accordance with the law of the place where the act or omission occurred."

Discretionary Function Exception
28 U.S.C. §2680(a)

"The provisions of this chapter and section 1346(b) of this title shall not apply to --

(a) Any claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

STATEMENT OF THE CASE

On October 10, 1979, Petitioner Gail Merchant Irving suffered a gruesome workplace injury which has been found by the court to be due to the negligence of the United States government. App. E-43. As Ms. Irving bent down to retrieve a glove she had dropped on the floor near her work station, her hair was drawn into an unguarded drive shaft, a condition flagrantly violative of then-existing OSHA standards. App. E-9, E-10. Rotating drive shafts such as the one in question were known to create a vacuum

effect which would draw in human hair. As Ms. Irving's hair wrapped around the rotating shaft, her head, neck and upper torso were instantly sucked into the drive shaft mechanism, fracturing her cervical spine. Ms. Irving's hair and scalp were ripped from her skull. Although Ms. Irving survived the ordeal, she was left with profound and permanent neurological deficits. App. E-58.

On two occasions prior to the incident in question, Compliance Officers from the Occupational Safety and Health Administration ("OSHA") had conducted wall-to-wall inspections of Somersworth Shoe, the factory in which Ms. Irving was injured. App. A-3. Although numerous citations were issued to Somersworth Shoe as a result of the two prior OSHA inspections (all of which were promptly corrected by the employer), neither inspection identified any problems or violations in the area of Ms. Irving's work station. App. A-3; App. E-48, 49. The unguarded drive shaft imperiling Ms. Irving's workstation was in the same condition during each of these pre-injury inspections. App. E-23.

Immediately following Ms. Irving's injury, a third OSHA inspection was conducted. The OSHA inspector conducting the third inspection testified that the unguarded drive shaft which injured Ms. Irving ranked as a hazard of the highest severity. App. A-3. All three OSHA inspectors (as well as their supervisor) ultimately agreed that the unguarded drive shaft which injured Ms. Irving was a blatant hazard that an OSHA inspector should never overlook, even (as one inspector conceded) "on his worst day". App. E-19.

Naturally, the OSHA inspectors were asked to explain what happened. Both pre-incident inspectors

insisted that they had inspected each machine, including Irving's, as they were required to do. App. G-14; App. E-18. Each testified that the hazard which injured Irving was "guarded by location" [4] at the time of the prior inspection. Because their failed defense was that they *did* inspect the machine which injured Ms. Irving, neither inspector ever suggested that he made a judgment call not to inspect the machine. In fact, no OSHA personnel contended that the failure to inspect Ms. Irving's machine was the result of a discretionary decision or policy-based choice. Ultimately, the trial court held that because the machine clearly had not been guarded by location at the time of the prior inspections, the only realistic explanation was that the inspectors inadvertently failed to inspect the machine at all. App. E-27.[5] This finding has never been challenged by the government or questioned by any reviewing court.

Ms. Irving's 20-year journey through the federal court system began in 1980. As with all claims under the FTCA, the case was commenced by means of a timely administrative claim. App. E-2. After the administrative claim was denied, suit was filed in the United States District Court for the District of New Hampshire on October 7, 1981. App. E-2. The United States filed

---

[4] In OSHA circles, the term "guarded by location" denotes a workplace hazard which, although lacking a specific guard, is shielded from human contact in some way. At the subsequent trial, Judge McAuliffe found that Irving had disproved the guarded by location defense "by a decided preponderance of the evidence". *Irving v. United States*, 942 F. Supp. 1483, 1495 (D.N.H. 1996)(App. E-23). This final ruling in Irving's favor on the "guarded by location" issue has never been challenged.

[5] In regard to the failure to inspect Irving's machine, it is significant to note that the plain language of the FTCA authorizes suits arising out of "negligent or wrongful acts *or omissions*" of federal employees. 28 U.S.C. § 1346(b)(emphasis supplied).

multiple motions to dismiss under the discretionary function exception to the FTCA, [6] essentially alleging that the acts of OSHA inspectors are inherently discretionary without regard to the facts of a particular case. *See, e.g., Irving v. United States*, 532 F. Supp. 840 (D.N.H. 1982). All such motions were denied by the court, which reasoned that, at least with respect to an action alleging negligence on the part of OSHA inspectors, resolution of the discretionary function exception was a fact-specific inquiry which could not be resolved on a motion to dismiss. *Id.* at 844. A four-day bench trial was held in February, 1985. App. E-2. However, after keeping the matter under advisement for three years without rendering any decision, the trial judge (Devine, J.) spontaneously and inexplicably reversed his earlier rulings and dismissed the claim under the discretionary function exception. App. E-2.

Irving appealed to the United States Court of Appeals for the First Circuit. App. E-3. While the appeal to the First Circuit was pending, this Court unanimously decided the seminal case regarding the discretionary function exception, *Berkovitz v. United States*, 486 U.S. 531 (1988). *Berkovitz* implemented a two-prong test for determining whether the exception applies so as to immunize the United States for the negligence of its employees:

---

[6] The discretionary function exception is a provision in the FTCA which serves to reinstate sovereign immunity in cases where the agent in question makes a decision "to act according to [his/her] judgment of the best course" *Dalehite v. United States*, 364 U.S. 15, 34 (1953). The purpose of the exception is to prevent judicial second-guessing of policy-based decisions of government agencies. *See Berkovitz*, 486 U.S. at 536-537; *see also United States v. Varig Airlines*, 467 U.S. 797, 814 (1984).

1. Was the act in question the product of a judgment or choice, and if so, did the acting employee have the authority to make this judgment or choice? *Id* at 536 "... conduct cannot be discretionary unless it involves an element of judgment or choice"; "... a court must first consider whether the action is a matter of choice *for the acting employee.*" (emphasis supplied). If not, the exception does not apply. *Id.*

2. Even if the act in question was the result of judgment or choice, was the decision "grounded in social, economic, and political policy"? *Id.* at 537. Unless both questions are answered in the affirmative, the plaintiff's case may proceed. *Id.*

Because the trial court had not been privy to the new *Berkovitz* test, the First Circuit vacated (via an unreported decision) the dismissal and remanded the matter for further consideration in light of *Berkovitz*. App. E-3.

Without analyzing the evidence in light of the *Berkovitz* test as the First Circuit had directed, the district court (Devine, J.) again dismissed the case based upon the discretionary function exception. App. F-4. A second appeal to the First Circuit followed, which again resulted in Judge Devine's dismissal being vacated and the case being remanded. *Irving v. United States*, 909 F.2d 598 (1st Cir. 1990)(App. G-1). The First Circuit opinion interpreting *Berkovitz* articulated the two-prong test precisely as outlined above. App. G-5 (First, "'[i]f the act simply does not involve the exercise of [policy] judgment,' or 'if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow' [the discretionary function exception] does not apply"; Second, "even when the challenged action is the product of an

employee's permissible use of judgment, a suit is barred only if that judgment ... [is] 'grounded in social, economic, and political policy'"). On remand, in order that the discretionary function issue could be resolved properly, the trial court was directed to make specific factual findings regarding the range of policy-level choices, if any, afforded to the OSHA inspectors in this case. *Id.* at 605 (App. G-15).

Just prior to the four-year anniversary of the remand, Judge Devine finally issued a memorandum opinion in which he again refused to follow the mandate of the First Circuit. App. F-5. Rather than making the factual findings necessary to resolve the discretionary function issue, the court proceeded to the merits. *Id.* The court held that the rotating shaft had been "guarded by location"[7] at the time of the two previous inspections, and thus the OSHA inspectors were not negligent. *Id.* Lacking an actual transcription of the relevant trial testimony, Judge Devine purported to justify these findings based upon his (then) nine-year-old personal trial notes and a deposition transcript which had never been admitted into evidence. *Id.*; App. F-12.

Irving appealed a third time to the First Circuit, and for the third time Judge Devine's judgment was vacated. The panel (Judges Bownes, Selya, and Stahl) chastised the trial court for ignoring its mandate, bypassing the discretionary function inquiry altogether, and "fundamentally misconstru[ing]" the evidence during its evaluation of the merits. App. F-5; App. F-12. The panel unanimously held that the discretionary function issue could not be resolved without further fact-finding. App. F-

[7] This finding was later reversed, and has since been definitively adjudicated in favor of Irving. *See supra* note 4.

9. The First Circuit again remanded the case to the district court with instructions that further proceedings be conducted before a different district judge. App. F-13.

District Judge McAuliffe was then assigned to the case, and a retrial was conducted in November, 1995. On August 29, 1996, Judge McAuliffe issued a painstaking, comprehensive memorandum decision which applies the *Berkovitz* test and resolves the discretionary function issue in favor of Irving. App. E-1. Because the OSHA inspectors were under a mandatory duty to inspect each machine in the factory, yet inadvertently (and negligently) failed to do so, the court found the discretionary function exception inapplicable. App. E-36. The court proceeded to find the government liable under the New Hampshire "good Samaritan" law. Damages in the amount of $1,239,162.68 were awarded.[8]

The government then initiated the fourth appeal to the First Circuit. In its original designation of appellate issues, the government listed the discretionary function exception as one of its appellate issues. However, in its ensuing brief of January, 1997, the government formally conceded the issue, stating:

> This failure [of the OSHA inspectors to actually inspect each machine] *violated a mandatory policy* and, as such, *precluded application of the*

[8] The trial court truncated the actual amount Irving can recover to $1,000,000, the amount demanded in her original administrative claim sixteen years prior to the award. Although Irving had moved twice before the award and once after to increase her administrative *ad damnum*, all three motions were denied, the courts concluding that they lacked authority to allow such amendments, however compelling the circumstances.

> *discretionary function exception*. Government Brief of January, 1997, at 4 (emphasis supplied).

So as to leave no doubt about its concession, the government further stated:

> Because the district court's finding is limited to the specific factual circumstances it found existed during the time and area covered by [the OSHA Area Director's] testimony, *the United States does not appeal the court's finding regarding the application of the discretionary function issue to this case. Id.* at 4-5, note 1 (emphasis supplied).[9]

The government's appeal thus proceeded only on the issue of whether the district court had properly applied New Hampshire's good Samaritan doctrine. The panel hearing the fourth appeal consisted of the same three judges who heard the 1995 appeal (Judges Bownes, Selya, and Stahl). On April 8, 1998, by a two-to-one vote (Selya, J. dissenting), the panel affirmed the judgment in favor of Irving. App. C-1.

Despite the government's concession, the panel chose to address the discretionary function exception. The panel held that the exception did not apply because the OSHA inspectors in question were under a mandatory duty

---

[9] Curiously, despite this explicit concession quoted directly from the government brief, the en banc majority stated: "...we have reviewed the record with care and can find no such concession." *Irving v. United States*, 162 F.3d 154 (1st Cir. 1998)(App. A-9). The dissent, by contrast, had no difficulty finding the concession. *Id.* (Bownes, J. dissenting)(App. A-50). In fact, the concession in the government brief was nothing more than a reiteration of the concessions of its counsel to the trial court at oral argument. *Irving*, 942 F. Supp. at 1499, note 19 (App. E-13, note 19).

to inspect every machine, yet inadvertently failed to do so. App. C-27. It is critical to note that Judge Selya, in his dissent to the panel opinion, challenged only a single issue, namely, the majority's treatment of the good Samaritan issue under New Hampshire law. App. C-69. Thus, the panel was unanimous in rejecting the discretionary function defense. Accordingly, on April 8, 1998, judgment (as well as an award of costs) was entered in Irving's favor.

Neither party sought any further relief from the First Circuit following the April 8, 1998 opinion. No post-opinion motions of any kind were filed, nor were any court orders entered before the mandate issued. Under Fed. R. App. P. 41, the mandate was automatically issued on, at the very latest, June 3, 1998.[10] Some nineteen years after her injury, a judgment in favor of Gail Merchant Irving had at long last become final.

However, after its jurisdiction had expired, without being requested to do so by either party, and without any explanation, the First Circuit, acting *sua sponte*, "withdrew" the April 8, 1998 decision on June 8, 1998. *Irving v. United States*, 146 F.3d 12 (1st Cir. 1998)(App. B-1). In response to Irving's motions following the recall, the First Circuit implicitly acknowledged the untimeliness of its order of June 8, 1998, yet offered two explanations in support of its continuing jurisdiction. *Irving v. United*

[10] Under Fed. R. App. P. 41, formal mandates are no longer issued. Instead, an informal mandate issues automatically, consisting (pursuant to Fed. R. App. P. 41) of the judgment, the court's opinion, and the direction as to costs. This de facto mandate "must issue" 7 days after the time limit for filing a petition for rehearing has expired (45 days in this case pursuant to Fed. R. App. P. 40). Although a rigid application of the rule would have the mandate issuing on May 30, 1998, because of an intervening holiday weekend, Irving has calculated the deadline conservatively at June 3, 1998.

States, Nos. 96-2368/96-2369 (1st Cir. February 9, 1999)(unpublished opinion)(App. D-1, D-2).

First, the court stated that a judge of the First Circuit had entered a "provisional" request for rehearing on April 20, 1998, before the deadline expired. *Id.* The "provisional" order of April 20, 1998 was never shared with the parties and appears nowhere in the official court record. Second, although the June 8 order ran afoul of the Rule 41 deadline, the court stated that the "direction to the clerk to enter the order" was made before the deadline. *Id.* The order does not supply the date on which the "direction to the clerk to enter the order" was issued. *Id.* Again, this "direction to the clerk" was never shared with the parties and appears nowhere in the official court record.

The matter was reheard by the First Circuit en banc in September, 1998. On December 18, 1998, in a five-to-two decision, the en banc court reversed the district court judgment for Irving (and, implicitly, its majority panel opinion of April 8, 1998 affirming same) and entered judgment in favor of the government. App. A-27, A-28. The *sole* basis of the reversal was the discretionary function defense, an issue which the government had formally waived in this appeal and which the withdrawn panel decision had unanimously resolved in Irving's favor. The en banc majority reasoned that the discretionary function exception immunizes even an inadvertent failure to inspect each machine in the plant, regardless of whether the inspectors were directed to inspect each machine in *this* plant, because no formal regulations dictate the comprehensiveness with which OSHA inspectors must conduct factory inspections in general. *Id.*, App. A-25.

In order to achieve this result, the majority overruled *Irving I* and *Irving II* (its prior reported decisions of 1990 and 1995 in this same case). App. A-10 -- A-12. In abandoning existing First Circuit discretionary function precedent, the author of the en banc majority opinion (Judge Selya) also departed from his own decisions in this same case in 1995 and 1998 (when he sat on the panels which unanimously ruled in Irving's favor on the discretionary function issue).

The majority opinion is followed by a highly critical, thoroughly documented 50-page dissent which begins with the charge: "The majority opinion fundamentally misconstrues controlling Supreme Court precedent in analyzing the discretionary function exception to the [FTCA]." App. A-30 (Bownes, J. dissenting). The dissent observes that:

> Astonishingly, the majority opinion fails even to discuss th[e] seminal case [of *Berkovitz*]. The majority reaches back to overrule *Irving I* and *Irving II* but inexplicably fails to discuss the *Berkovitz* decision which prompted those opinions. ... [I]n rejecting those [unanimous] panel decisions, the majority does not itself discuss or distinguish -- much less apply -- the Supreme Court's analysis or holding in *Berkovitz*. App. A-36, note 18.

The dissent further accuses the majority of misstating Irving's theory of the case so it could then "bravely shoot[] down this straw man." App. A-52. Ultimately the dissent concludes:

> I have great regard for my colleagues on this court. But however able they may be, they do not have the

authority to refuse to follow a binding precedent from the Supreme Court of the United States. App. A-66.

Irving filed a timely petition for rehearing pursuant to Fed. R. App. P. 40. The petition challenged the recall of the April 8, 1998 panel opinion; the decision to revisit the discretionary function issue *sua sponte* notwithstanding the government's waiver; and the majority's failure to follow the controlling test set forth by this Court in *Berkovitz*. The petition was denied, again by a five-to-two vote, by order of February 9, 1999. App. D-1, D-2. The order of February 9, 1999 discussed only the propriety of the recall, concluding that the recall was proper in light of the "provisional" order and the "direction to the clerk". *Id.* The merits of Irving's petition for rehearing were not discussed. *Id.* Ms. Irving then filed an additional motion requesting disclosure of the nature, timing, content, etc. of the "provisional" order and the "direction to the clerk", but her plea was summarily denied.

REASONS FOR GRANTING THE WRIT

Certiorari is respectfully requested to review three issues. First, the *sua sponte* recall of the April 8, 1998 panel decision in Irving's favor is repugnant to this Court's recent holding in *Calderon v. Thompson*, 118 S. Ct. 1489 (1998). Second, the majority treatment of the discretionary function issue fundamentally misconstrues the test articulated by this Court in *Berkovitz*. Third, it was clear error for the en banc majority to raise the discretionary function issue *sua sponte* when the government had

formally conceded the issue and the panel had unanimously resolved the question in Irving's favor.

1. The First Circuit's Unexplained *Sua Sponte* Recall of the Panel Decision in Petitioner's Favor Violates this Court's Teaching in *Calderon* and Constitutes Such a Departure from Accepted Judicial Procedures as to Warrant Review By this Court.

Supreme Court Rule 10(a) provides that a petition for writ of certiorari may properly be granted upon a showing that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." Indeed, such a departure has occurred with respect to the First Circuit's recall of its mandate in favor of Irving, which recall was undertaken *sua sponte* and without substantive explanation. *See Irving v. United States*, 146 F.3d 12 (1st Cir. 1998). As stated above, the court's explanation relies solely on a previously undisclosed "provisional" order and a "direction to the clerk to enter the order granting rehearing en banc". App. D-1, D-2. Neither of these "orders" were ever served on the parties, appear anywhere in the official court record, or have any recognized existence in federal jurisprudence. Since the mandate formally marks the end of the court of appeals' jurisdiction, all ensuing action of the First Circuit is a nullity.

In addition to the above, Supreme Court review of this issue is also authorized by Rule 10(c), since the recall violates the *Calderon* standard. This Court has repeatedly recognized the "deep-rooted policy in favor of the repose of judgments". *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944). Accordingly, a court of

appeals may only recall a mandate in "extraordinary circumstances", as a means of "last resort" to protect against "grave, unforeseen contingencies." *Calderon v. Thompson*, 118 S. Ct. 1489, 1498 (1998).[11] In light of this stringent standard, mere negligence or tardiness of judges will ordinarily not support a recall. *Id.*, 118 S. Ct. at 1499. This is especially true where, as here, the only consequence would be the lack of en banc review in a case which had been given full consideration on the merits by a panel of the court. *Id.* Even though *Calderon* involved a recall two days before the scheduled execution of a convict, the Court stated: "Even if this were a case implicating no more than ordinary concerns of finality, we would have grave doubts about the actions taken by the Court of Appeals." *Id.*

The First Circuit made no effort to even acknowledge, much less meet, this Court's established standard. The June 8, 1998 order merely stated, in pertinent part, that "A majority of the judges of this court in active service have voted *sua sponte* to review the panel decision in this matter en banc." *Irving*, 146 F.3d at 12. No discussion was dedicated to the reason for the recall. *Id.* Instead, the court simply directed the parties to rebrief the discretionary function issue (as well as the good Samaritan issue which was the subject of the dissent in the panel decision). *Id.* The parties then proceeded with what was essentially a fifth briefing and oral argument before the First Circuit.

---

[11] As *Calderon* acknowledged, there is some doubt about whether a court of appeals can *ever* recall its mandate. *Id.*, *citing United States v. Ohio Power Co.*, 353 U.S. 98, 102-103 (1957)(Harlan, J., dissenting). Since the recall in this case constitutes a clear abuse of discretion, however, the instant appeal should not require the Court to revisit the question of whether a mandate can ever be recalled.

No serious contention can be made that the panel's resolution of the discretionary function issue was a "grave, unforeseen contingency". App. A-31, note14 (Bownes, J. dissenting) (questioning the propriety of raising the issue en banc when none of the three panel judges, including the judge who eventually authored the en banc majority opinion, contested the discretionary function issue when the panel resolved it in Irving's favor). Indeed, as of the time of the recall, this matter had been before the First Circuit on four prior occasions, all of which decided the same discretionary function issue in Irving's favor. Furthermore, none of the four prior appeals involved a suggestion, by either party or the court acting *sua sponte*, that en banc review was necessary, either originally or upon rehearing. After four appeals spanning the twenty-year history of this case, it would be impossible to imagine any contingency which could honestly be labeled "unforeseen", grave or otherwise.

It would be spurious to suggest that a successful case against OSHA constitutes on its own the type of "grave, unforeseen contingency" contemplated in *Calderon*. It is common knowledge that federal agencies routinely are sued, held liable, and/or voluntarily settle claims. After all, Congress intended the FTCA to represent a "broad waiver of sovereign immunity". *Berkovitz*, 486 U.S. at 535. This Court has respected Congress' intent by upholding potential government liability in many instances similar to the case at bar. *Berkovitz*, 486 U.S. 531 (1988)(negligent release of polio virus by FDA); *Block v. Neal*, 460 U.S. 289 (1983)(negligent inspection by FmHA official); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955)(negligent failure to maintain light in lighthouse). In short, this Court has warned that the courts are not to act "as [] self-constituted guardian[s] of the Treasury import[ing]

immunity back into a statute designed to limit it", *Id.* at 69, an admonition the en banc majority clearly ignored.

It also bears mentioning that, notwithstanding Irving's victory, the discretionary function exception would still bar many, if not most, claims arising out of negligent OSHA inspections. *Irving*, 942 F. Supp. at 1500. The withdrawn panel opinion was in agreement, as was the government itself (as documented above, the government formally conceded the issue in its brief). Thus, all parties agreed that the facts of this case gave rise to the type of unique, isolated, fact-specific holding that could never form the basis of a claim of "grave, unforeseen contingency". The district court opinion represented a fairly routine FTCA analysis, wherein the controlling *Berkovitz* test is properly recited and then routinely applied to a particular set of facts.[12]

The *Calderon* Court expressed additional concern regarding recalls which are undertaken by a court *sua sponte*. *Id.*, 118 S. Ct. at 1507 (Souter, J., dissenting). Indeed, the *Calderon* dissent acknowledged an apprehension of "overuse and misuse of the recall power". *Id.* The Court proceeded to suggest that it may find it necessary to reverse a future case simply to deter overuse of the *sua sponte* recall power. *Id.*, 118 S. Ct. at 1507-1508. Irving respectfully suggests that this case evidences the need for just such a deterrent -- after two trials and four

[12] Because the en banc majority, by contrast, has fundamentally misconstrued *Berkovitz*, failure to correct the erroneous en banc majority opinion would result in "grave contingencies". Not only has Ms. Irving been wrongfully denied justice, but, in overruling both *Irving I* and *Irving II*, the majority opinion eviscerates a decade of sound First Circuit discretionary function precedent. In the absence of review from this Court, there is the danger that this fundamental error will proliferate in the First Circuit and beyond.

appeals over a twenty-year period, a final judgment, achieved fair and square, should not be subject to a *sua sponte* recall at the whim of a dissenting judge.

In light of the concern over *sua sponte* recalls shared by both the majority and the dissent in *Calderon*, Irving respectfully suggests that this matter may be ripe for summary reversal and reinstatement of the panel opinion in favor of Irving. *See* Supreme Court Rule 16.1; *see also Meeks v. Georgia, S. & F. R. Co.*, 377 U.S. 405 (1964).

2. The First Circuit Resolved the Discretionary Function Question in a Manner Directly in Conflict with the Seminal Case of *Berkovitz*.

The second reason review should be granted is that the decision below is flatly contrary to this Court's seminal decision on the discretionary function exception to the FTCA in *Berkovitz v. United States*, 486 U.S. 531 (1988). The unanimous *Berkovitz* Court established a two-part test that the lower courts must follow in deciding discretionary function issues:

a. The court must first consider whether the act complained of (here, the failure to undertake *any* inspection of the machine in question) was a matter of choice *for the acting employee*. *Id.* at 536 (emphasis supplied).

b. Even if the act involved does involve choice on the part of the acting employee, the court must still determine whether the act was based on considerations of public policy. *Id.* at 536-537.

A negative answer to *either* question precludes application of the exception and thus permits the plaintiff's case to proceed. *Id.*

As this Court has lamented, "[u]nfortunately, lower courts have had difficulty in applying this test." *United States v. Gaubert*, 499 U.S. 315, 335 (1991) (Scalia, J., concurring). The holding of the en banc majority alarmingly elevates this Court's rightful concern.

The specific act which Irving has challenged is the failure of the OSHA inspectors to actually inspect the machine which injured her on either of the pre-incident inspections. Critical to the discretionary function inquiry is the response of the inspectors to Irving's contention. Neither inspector claimed that a decision was made not to inspect the machine for some policy-based reason. Instead, the unanimous response of both inspectors was that they *did* inspect the machine (as they were required to do) and found it to be "guarded by location".

The trial court soundly rejected the inspectors' contention in this regard, finding that Irving had disproved the "guarded by location" theory "by a decided preponderance of the evidence". *See supra* note 4. The trial court held that the inspectors' explanation was simply inaccurate, and that the only reasonable explanation of the facts was that neither inspector actually inspected the machine as they were supposed to do. *Irving*, 942 F. Supp. at 1497 (App. E-27). These findings were never challenged by the government, either before the district court or on appeal.[13]

Because the inspectors' failed defense was that they *did* inspect the machine in question, they obviously did not and could not offer any reason why they *did not* inspect it.

---

[13] The justice department chose not to challenge this factual finding on appeal, presumably because a decision had been made to concede the discretionary function issue altogether. *See supra* pp. 9-10.

Thus, there is not the slightest suggestion that either inspector "chose" not to examine the machine which injured Irving, or that either made a "judgment" or "decision" in not examining it. In short, the inspectors' own theory (that the machine was inspected and found to be "guarded by location") is manifestly inconsistent with the proposition that a policy-based decision was made not to inspect it. This reality eviscerates the discretionary function defense under the most rudimentary FTCA principle -- "conduct cannot be discretionary unless it involves an element of judgment or choice." *Berkovitz*, 486 U.S. at 536. Essentially the en banc court cast aside *Berkovitz* to allow it to achieve a pre-determined result, thereby denying Gail Irving the justice she had so long awaited.

In light of this factual backdrop by which the en banc majority was bound, the two-prong *Berkovitz* analysis should have been academic. Under prong one, the inescapable conclusion is that the failure to inspect the machine was not a matter of choice for the acting inspectors, because (a) they did not choose to refrain from inspecting the machine, they inadvertently neglected to inspect each machine (although required to do so); and (b) the trial court found as a factual matter that the inspectors "had no rightful option but to" inspect each machine. Thus, the exception cannot apply to this case and the analysis need not have gone any further.

The second prong of the test also compels the conclusion that the discretionary function exception is no bar to Irving's case. Under prong two, the inescapable conclusion is that the failure to inspect the machine was not the result of policy-based considerations, because (a) such considerations cannot be attributed to an inspection which

the officials thought they performed but did not, and (b) no source has ever suggested that any public policy was furthered or sought to be furthered by the inspectors' conduct *in this case*.

The determination of the en banc majority results, with all due respect, in a profound absurdity. The defendant inspectors deny that they made a conscious decision not to inspect the machine in question -- insisting the mandatory inspection had been performed -- but the majority holding nevertheless presumes (without a shred of supporting evidence) that such a choice was made![14] To compound the absurdity, the majority then resolves the second prong of the *Berkovitz* test by concocting and injecting considerations of public policy into this non-existent choice.[15] Again, this determination is devoid of any factual support whatsoever in the record and directly contrary to the inspectors' own explanation of what happened.

---

[14] Although the majority opinion does not expressly state that the inspectors made a conscious decision not to inspect the machine which injured Irving, such a finding is a necessary prerequisite to its holding that the discretionary function exception applies. *Berkovitz*, 486 U.S. at 536 ("conduct cannot be discretionary unless it involves an element of judgment or choice"). If the majority had acknowledged that the inspectors intended to inspect each machine, thought they did, but failed to do so as a result of mere inadvertence, the discretionary function defense would have been unavailable. *Id. citing Dalehite*, 364 U.S. at 34 (exception protects only decisions "to act according to one's judgment of the best course").

[15] Here, the majority acknowledges that these particular inspectors did not actually engage in any policy-related judgment. App. A-25. Nevertheless, the majority erroneously concludes that prong two of the *Berkovitz* test is satisfied because, even though it did not occur in this case, an OSHA inspector *could* hypothetically make a decision not to inspect and that decision *could* be susceptible to policy analysis. *Id.*

This holding resolves an important federal question in a manner entirely in conflict with each prong of the controlling FTCA case of *Berkovitz*. Under the majority interpretation, the discretionary function exception swallows the waiver of sovereign immunity to such an extent that, contrary to the clear intent of Congress, virtually all government negligence is immunized. As such, a grant of certiorari is eminently proper, if not compelling. *See* Supreme Court Rule 10(c).

3. The First Circuit Improperly Undertook a *Sua Sponte* Review of the Discretionary Function Issue Notwithstanding the Government's Formal Concession with Respect Thereto.

Although an examination of the merits will quickly reveal gross, reversible error in the majority's treatment of the discretionary function issue, there was no reason to reach this question in the first place. After all, as of the time of en banc review, the First Circuit had on four separate occasions reviewed this same discretionary function issue in this same case, unanimously ruling in Irving's favor every time. The district court also ruled in Irving's favor on this issue. Finally, as quoted in the Statement of the Case above, *see supra* pp. 9-10, the government candidly chose to formally and explicitly concede this non-issue in its appeal. Nevertheless, as was the case with the request for rehearing en banc, the abandoned discretionary function issue was inexplicably resuscitated by the First Circuit *sua sponte*.

Federal courts occasionally have raised the discretionary function issue *sua sponte* in the name of jurisdiction. Since the discretionary function issue does speak to the courts' subject matter jurisdiction, this

rationale has at least a technical justification. But this fragile justification is untenable in a case where *this same court* has considered *this same issue* in *this same case* on four prior occasions, upholding jurisdiction each time. *Irving*, 909 F.2d 598, 599 (reviewing first (and unpublished) opinion of the First Circuit concerning the discretionary function exception); *Id.* at 605 (second opinion on discretionary function exception); *Irving*, 49 F.3d 830, 835 (1st Cir. 1995)(third opinion on discretionary function exception); *Irving*, 1998 WL 152941 (1st Cir. April 8, 1998)(fourth opinion on discretionary function exception). Furthermore, since the discretionary function issue operates more like an affirmative defense than a true jurisdictional inquiry, a formal concession from the justice department of the United States government should obviate any need for a court to raise the issue at all, let alone by the extraordinary recall process. [16]

Although it does not appear that this Court has ever squarely held that *sua sponte* review of the discretionary function issue is inappropriate, *dicta* from several FTCA cases strongly supports this proposition. For example, the *Varig* Court emphasized: "Significantly, the Government *conceded* that the discretionary function exception was not implicated in *Indian Towing* ...") *Varig*, 467 U.S. at 812 (emphasis in *Varig*); *see Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955)(framing an FTCA issue by noting with apparent approval that the government had "concede[d]" the discretionary function issue). Similarly,

---

[16] It bears mentioning, in this regard, that the United States government is not an ordinary defendant. On the contrary, the justice department attorneys, who exclusively defend FTCA cases in volume, possess specialized knowledge on every angle of the discretionary function exception. A formal concession from the justice department on this issue should be given the greatest deference by the federal courts.

in *Block v. Neal*, 460 U.S. 289 (1983), this Court introduced an FTCA claim by noting that "[the Court was not] called on to consider whether recovery is barred by ... the exception for any action 'based upon the exercise of performance or the failure to exercise or perform a discretionary function.'" *Id.* at 294. Most recently, in *Gaubert*, this Court again stressed that the Government in *Indian Towing* "did not even claim the benefit of the [discretionary function] exception ...". *Gaubert*, 499 U.S. at 326.

In all of the above FTCA cases, this Court accepted the parties' concession of the discretionary function issue and saw no reason to raise the matter *sua sponte*. Indeed, it does not appear that this Court has ever raised the discretionary function issue *sua sponte*, nor has it directed the lower courts to do so. Thus, a fair interpretation of existing Supreme Court precedent is that the federal courts are not duty-bound to raise the discretionary function issue *sua sponte* in every case regardless of the parties' concessions. Indeed, if there were ever a proper case for the court to repudiate the government's expertise in conceding this issue, Ms. Irving's case, considering its tortuous history, equities, etc. (*see* App. A-27 -- A-28), is not the one.

The en banc majority deviates once more from precedent of this Court, stating that "[f]ederal courts, being courts of limited jurisdiction, have an affirmative obligation to examine jurisdictional concerns on their own initiative." App. A-8. Ultimately, the en banc majority held as follows: "Consequently, even if the government failed properly to raise and preserve[17] the discretionary function defense -- a

[17] Irving did not argue that the government had simply failed to raise or preserve the discretionary function exception. Rather, Irving's position

question on which we take no view -- we nonetheless are bound to consider it." App. A-8, App. A-9.

Because this holding "conflicts with relevant decisions of this Court" (*see* Supreme Court Rule 10(c)) as outlined above, Irving respectfully suggests that certiorari should be granted and full review be undertaken, if indeed the Court does not conclude that the cause of justice mandates summary reversal.

CONCLUSION

Nineteen years after the horrible injury to Gail Irving, after two trials and four appeals, a final judgment was at long last entered in her favor. Two months later, in violation of this Court's standard in *Calderon*, the First Circuit recalled its mandate *sua sponte* and without explanation. The majority then undertook a discretionary function analysis which is totally repugnant to this Court's landmark precedent in *Berkovitz* and ultimately reversed the judgment. Although the government had formally waived the discretionary function exception and the First Circuit had unanimously resolved the issue in Irving's favor on four previous occasions, the court held, contrary to the strong suggestions of this Court, that it was nevertheless duty-bound to raise the discretionary function issue *sua sponte*. Effectively, the majority, in defiance of controlling law, has absolved the tortfeasor (OSHA) notwithstanding

---

was that the government had affirmatively conceded the matter. *See supra* pp. 9-10.

its undeniable responsibility for the victim's catastrophic injuries.

The petitioner respectfully submits that the majority opinion constitutes a gross departure from the accepted course of judicial proceedings and the controlling precedent of this Court. This Petition thus raises questions of exceptional importance and fundamental judicial fairness. Ms. Irving respectfully requests that her Petition For Writ of Certiorari be granted and that this miscarriage of justice be summarily reversed, or alternatively, that her case be set down for full review.

Respectfully submitted,

Matthew B. Cox
counsel of record
Paul R. Cox
Burns, Bryant, Hinchey,
Cox & Rockefeller, P.A.
P.O. Box 608
Dover, NH 03821-0608
(603) 742-2332

Leslie A. Brueckner
Arthur H. Bryant
Trial Lawyers for Public
Justice, P.C.
1717 Massachusetts Avenue, N.W.,
Suite 800
Washington, D.C. 20036
(202) 797-8600

Attorneys for Petitioner

APPENDIX

TABLE OF CONTENTS

Appendix A
First Circuit en banc opinion, 12/18/98 ..... A-1

Appendix B
First Circuit *sua sponte* recall order, 6/8/98 ..... B-1

Appendix C
First Circuit panel opinion, 4/8/98 ..... C-1

Appendix D
First Circuit order denying rehearing,
2/9/99 ..... D-1

Appendix E
District Court decision on merits, 8/29/96 ..... E-1

Appendix F
First Circuit panel opinion, 3/16/95 ..... F-1

Appendix G
First Circuit panel opinion, 7/25/90 ..... G-1

United States Court of Appeals
For the First Circuit

No. 96-2368

GAIL MERCHANT IRVING,
Plaintiff, Appellee,

v.

UNITED STATES OF AMERICA,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. Steven J. McAuliffe, U.S. District Judge]

Before

Torruella, Chief Judge,
Bownes, Senior Circuit Judge,
Selya, Boudin, Stahl, Lynch and Lipez, Circuit Judges.

Phyllis J. Pyles, Attorney, Torts Branch, Civil Division, with whom Frank W. Hunger, Assistant Attorney General, Paul M. Gagnon, United States Attorney, and Jeffrey Axelrad, Attorney, Torts Branch, Civil Division, were on brief, for appellant.

Paul R. Cox, with whom Matthew B. Cox and Burns, Bryant, Hinchey, Cox & Rockefeller, P.A. were on brief, for appellee.

OPINIONS EN BANC

December 18, 1998

SELYA, Circuit Judge. Almost two decades ago, Gail Merchant Irving suffered horrific injuries in a workplace accident. She sued the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, claiming that inspectors employed by the Occupational Safety and Health Administration (OSHA) negligently performed their duties and thereby proximately caused her injuries. The case traveled an inexcusably long and tortuous route to a decision on the merits - a route that included four detours to this court. Ultimately, the district court, proceeding under a legal framework established by a panel of this court, concluded that the FTCA's discretionary function exception did not bar the plaintiff's claim; that the OSHA inspectors had acted negligently; and that such negligence was actionable under applicable state law. See Irving v. United States, 942 F. Supp. 1483 (D.N.H. 1996) (Irving III). The court awarded the plaintiff $1,000,000 in damages. See id. at 1502.

A divided panel of this court affirmed the judgment, see Irving v. United States, 1998 WL 152941 (1st Cir. Apr. 8, 1998), but the full court, acting sua sponte, withdrew the opinion and ordered rehearing en banc, principally to review the important question of whether the FTCA's discretionary function exception foreclosed the plaintiff's negligent inspection claim. We now answer that question in the affirmative.[1]

---

[1] When the panel originally heard the appeal from the judgment in Irving III, prior circuit precedent (i.e., Irving v. United States, 909 F.2d 598 (1st Cir. 1990) (Irving I), and Irving v. United States, 49 F.3d 830 (1st Cir. 1995) (Irving II)) preempted the discretionary function question. Thus, the dissenting judge, while "doubt[ing] the correctness of the majority's rendition of . . . federal . . . law," Irving, 1998 WL 152941, at *37 (Selya, J., dissenting), premised his dissent on the theory that, under New Hampshire law, a private individual in like circumstances would not be liable in tort for the allegedly negligent inspection that forms the gravamen of the plaintiff's suit. See id. On en banc review, the federal question not only is open, but also is dispositive. Since the en banc court concludes that the OSHA inspectors' allegedly negligent conduct is exempted from the FTCA's limited waiver of sovereign immunity by

I. BACKGROUND

Because the district court has faithfully chronicled the tangled events that preceded this appeal, see Irving III, 942 F. Supp. at 1485-98, we offer only a synopsis. We refer the reader who hungers for greater detail to the district court's account.

In 1979, Somersworth Shoe Company operated a manufacturing plant in New Hampshire. On October 10 of that year, the plaintiff, a Somersworth Shoe employee, was stamping innersoles by means of a marker machine. At one point, she went behind her workbench to obtain materials from the die rack. In the process, she dropped a glove. When she stooped to retrieve it, her hair was drawn into the vacuum created by the high-speed rotation of a drive shaft that delivered power to an adjacent "die-out" machine. She sustained grievous injuries.

OSHA compliance officers twice had inspected the plant (once in 1975 and again in 1978) under the auspices of OSHA's authority to conduct general administrative inspections, but had not noted any hazard in connection with the placement or guarding of the die-out machine in the stock fitting room or the bench assembly associated with it. Six days after Irving's mishap, OSHA conducted an inspection focused on the accident and concluded that the arrangement violated OSHA standards in three separate respects, and that all three conditions were "serious."[2] The most important of these was the company's failure to guard the drive shaft component of the die-out machine. See 29 C.F.R. § 1910.219 (c) (2) (ii) ("Shafting under bench machines shall be enclosed

---

operation of the discretionary function exception, see text infra, this opinion does not address the state-law question.

[2] The Occupational Safety and Health Act (OSH Act) defines a "serious" condition as one posing "a substantial probability that death or serious harm could result." 29 U.S.C. § 666 (k).

by a stationary casing, or by a trough at sides and top or sides and bottom, as location requires.").

After exhausting her administrative remedies, the plaintiff invoked the FTCA and sued the United States in New Hampshire's federal district court. She alleged that OSHA's negligence in failing to note and cite the unguarded condition of the drive shaft during the two pre-accident inspections proximately caused her injuries. Had the OSHA compliance officers documented the condition of the die-out machine, the plaintiff reasoned, her employer would have taken corrective action and her injury would not have occurred.

The United States moved to dismiss the suit on the ground that the FTCA's discretionary function exception barred the plaintiff's claim.[3] The district court denied the motion. See Irving v. United States, 532 F. Supp. 840 (D.N.H. 1982). Trial commenced on February 11, 1985, and ended three days later. The district court took the matter under advisement, but did not act for almost three years. At that point, the court reversed its field and concluded that the discretionary function exception applied after all. See Irving v. United States, No. Civ C81-501-SD, slip op. (D.N.H. Jan. 27, 1988) (unpublished). Accordingly, it dismissed the case for lack of subject matter jurisdiction.

A panel of this court vacated the order of dismissal and asked the district court to consider the impact of a newly decided case, namely, Berkovitz v. United States, 486 U.S. 531 (1988). See Irving v. United States, 867 F.2d 606 (lst Cir. 1988) (table). The district court determined that Berkovitz did not alter the result. See Irving v. United States, No. Civ.

---

[3] The FTCA is a limited waiver of sovereign immunity. In enacting the statute, Congress prescribed a number of situations in which the waiver would not attach. See 28 U.S.C. § 2680. One such exception is for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

C81-501-SD, slip op (D.N.H. Feb 14, 1989) (unpublished) The plaintiff again appealed.

A second panel of this court vacated the judgment. See Irving v. United States, 909 F.2d 598 (lst Cir. 1990) (Irving I). The panel recognized that, "[w]ere the statute and the formal regulations the only standards guiding the compliance officer's conduct, the discretionary function exception would apply." Id. at 603. But, the panel stated, even though these standards "give OSHA wide freedom at higher agency levels to make decisions and formulate programs," it "does not follow" that "an employee who performs an inspection has the type and breadth of discretion which makes the inspection a discretionary function." Id. The panel thus concluded that further analysis and factfinding were required to determine what OSHA policy actually required of OSHA compliance officers engaged in inspection activities. See id. As a corollary to this point, the panel noted that certain statements by OSHA's area director and the individuals who conducted the earlier inspections suggested that compliance officers may not have enjoyed discretion over how thoroughly they were required to inspect a plant. See id. at 604-05. Because these statements were inconclusive, however, the panel remanded for further factfinding to determine "whether OSHA policy left the thoroughness of inspections a matter of choice for its compliance officers," and if so, "whether the inspectors had policy-level discretion to fail to note and tell the employer about the violation" which allegedly caused plaintiff's injury. Id. at 605.

The district court pondered matters for four more years. Eventually, the judge, relying on a partial transcript of the 1985 trial, supplemented by his own notes, leapfrogged the discretionary function exception entirely and decided the case on the merits, concluding that the United States was not negligent because the die-out machine's drive shaft was "guarded by location" at the time of the inspections and, therefore, in full compliance with OSHA regulations. Irving

v. United States, No. Civ. C81-501-SD, 1994 WL 287750, at *3 (D.N.H. June 23, 1994). The plaintiff again appealed.

A third panel of this court vacated the judgment, discerning no basis for the "guarded by location" fact determination. See Irving v. United States, 49 F.3d 830, 835-37 (lst Cir. 1995) (Irving II). The panel then addressed the government's attempted resurrection of its discretionary function defense and rejected it as foreclosed by the prior panel decision. See id. at 834 (noting that the panel did not feel "free to revisit" the legal conclusions explicated in Irving I). In the bargain, the panel dismissed the government's plaint that the Supreme Court's intervening decision in United States v. Gaubert, 499 U.S. 315 (1991), made a decisive difference. See Irving II, 49 F.3d at 834-35.

At this juncture, a different trial judge assumed responsibility for the case. Operating within the legal framework erected by Irving I and reinforced by Irving II, the district court concluded that, even though the applicable statute, regulations, and written agency guidelines appeared to grant compliance officers substantial discretion over how to conduct inspections, this discretion was restricted "by less formal, but no less binding, OSHA policy." Irving III, 942 F. Supp. at 1490-91. To determine the parameters of this purported policy, the district court relied exclusively on evidence adduced at the 1985 trial. It found that the testimony of the compliance officers who had conducted the 1975 and 1978 inspections and the area director who was their superior limned a policy that "required" OSHA's "wall-to-wall" inspections to be "complete" in every respect. Id. at 1491. This, the district court added, meant that OSHA inspectors were obligated to examine "every operational machine and work station in the plant." Id. Finding that the inspectors had been negligent for not examining and/or citing the die-out machine, the court held that the United States was liable. See id. at 1505, 1510. This appeal ensued.

II. PROCEDURAL ISSUES

Because this case comes before us in an anomalous procedural posture, we begin by addressing a series of questions related to the justiciability of the discretionary function issue.

A. Forfeiture.

When the United States instituted this appeal, it did not ask the panel to reverse the district court's refusal to apply the discretionary function exception. The plaintiff now seeks to convince us that this omission precludes the en banc court from considering the issue. We are not persuaded.

In the ordinary course, a party seeking to preserve a point for review must present it seasonably in both the trial and appellate courts and offer developed argumentation in support. See, e.g., United States v. Bongiorno, 106 F.3d 1027, 1034 (lst Cir. 1997). Thus, a party who fails to raise a particular claim or defense at a prior stage in the litigation normally forfeits the right to assert it at a later stage. See National Ass'n of Soc. Workers v. Harwood, 69 F.3d 622, 627-29 (lst Cir. 1995). But the instant case does not fit this paradigm neatly. Even though the United States did not hawk its basic discretionary function defense the last time around, it did assert the defense at the very beginning of this case and persistently raised it thereafter. It was not until the final round of litigation that the government put down those cudgels.

The United States had good reason not to press its basic discretionary function point at that stage (either in the district court or before the fourth appellate panel). In Irving I, a panel of this court expressly defined the contours of the discretionary function exception. 909 F.2d at 601-05. From then on, that methodology represented both the law of the case and the law of this circuit regarding the due application of the discretionary function exception. The law of the circuit doctrine, as a general matter, permits successor panels to revise prior panel decisions in only two types of circumstances: (1) when supervening authority (such as a

newly enacted statute, an intervening opinion of the Supreme Court, or a subsequent ruling of the en banc court) directly requires such a step, or (2) when newly emergent authority, though not controlling, offers a clear and convincing reason to conclude that the earlier panel would have decided the issue differently. See Williams v. Ashland Eng'g Co., 45 F.3d 588, 592 (lst Cir. 1995). Indeed, when the United States asserted the discretionary function defense in Irving II, the panel not only took refuge in the law of the circuit doctrine to dispense the argument, but also rejected the government's importuning that the Supreme Court's 1991 decision in Gaubert required a modification of the prior circuit precedent. See Irving II, 49 F.3d at 834-35. Because two panels of this court had squarely rebuffed the government's discretionary function defense, it is hardly surprising that the government did not raise it anew in subsequent proceedings before yet another (co-equal) panel of this court. See Louisiana-Pacific Corps. v. ASARCO, Inc., 24 F.3d 1565, 1583 (9th Cir. 1994) (stating that raising a point on appeal that governing state law foreclosed would have been "foolish," and excusing waiver); see also United States v. London, 66 F.3d 1227, 1239-240 (lst Cir. 1995).

In sum, strong arguments can be made for not finding a forfeiture here or, at least, for not strictly applying forfeiture principles. Still, we need not definitively decide the point, for there is a simple, clearcut answer to whether the question is properly before us. After all, the discretionary function exception to the FTCA implicates the federal courts' subject matter jurisdiction. Federal courts, being courts of limited jurisdiction, have an affirmative obligation to examine jurisdictional concerns on their own initiative. See BIW Deceived v. Local S6, Indus. Union of Marine & Shipbuilding Workers, 132 F.3d 824, 828 (lst Cir. 1997). Consequently, even if the government failed properly to raise and preserve the discretionary function defense - a question on which we

take no view - we nonetheless are bound to consider it.[4] See Hydrogen Tech. Corp. v. United States, 831 F.2d 1155, 1162 n.6 (1st Cir. 1987).

In her supplemental brief, the plaintiff puts a somewhat different spin on the forfeiture argument. Citing a footnote in the final district court opinion, she argues that the government conceded the discretionary function question in that venue by admitting that OSHA policy required its compliance officers to "inspect every operation". Irving III, 942 F. Supp. at 1491 n.8. Waiver is, of course, a matter separate from forfeiture. See United States v. Olano, 507 U.S. 725, 733 (1993). Be that as it may, we have reviewed the record with care and can find no such concession.[5] In any event, insofar as the plaintiff

---

[4] Ascertaining the existence vel non of subject matter jurisdiction is one situation in which the en banc court is especially justified in invoking its inherent power to rehear matters of great importance. See Fed. R. App. P. 35(a); see also Western Pac. R.R Corps. v. Western Pac. R.R. Co., 345 U.S. 247, 262 (1953) (discussing an en banc court's sua sponte power to rehear cases); 16A Charles Alan Wright, et al., Federal Practice and Procedure § 3981.2, at 570 (2d ed. 1996). Moreover, because the discretionary function exception often involves delicate separation of powers concerns, see United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984), we likely would be justified in raising the issue even if all parties had neglected it altogether.

[5] The plaintiff directs our attention to a portion of the arguments in the district court where the government's lawyer seemed to agree that OSHA inspections involved reviewing all operations in a workplace. We note, however, that counsel for the United States specifically and emphatically declined, on more than one occasion, to accept the district court's conclusion that reviewing every operation meant inspecting every machine in a plant. To the precise contrary, the United States maintained throughout the proceedings that determining the thoroughness of a workplace inspection constituted a discretionary function. Although the district court concluded that "operation" means "machine" - a matter we address infra - it did so upon its own initiative, not based on any concession by the United States. Furthermore, a fair reading of the only passage that even remotely permits a gloss that counsel for the United States conceded the discretionary function question reveals that counsel was responding to a hypothetical posed by the court, and qualified the response.

asserts that the United States has conceded the discretionary function issue, we note that parties do not possess the power to confer subject matter jurisdiction on a federal court by concession.[6] See United States v. Horn, 29 F.3d 754, 768 (1st Cir. 1994).

B. Power of the En Banc Court.

The procedural tangle in this case raises yet another question: may an en banc court review issues decided by panels of the court in prior appeals in the same litigation? We hold that neither the law of the case doctrine nor the law of the circuit doctrine disables an en banc court from overruling a panel decision from a prior appeal in the same case. Accord Watkins v. United States Army, 875 F.2d 699, 704-05 n.8 (9th Cir. 1989) (en banc); Shimman v. International Union of Operating Eng'rs, Local 18, 744 F.2d 1226, 1229 n.3 (6th Cir. 1984) (en banc). The authority to overrule the decision of a prior panel in the same case flows logically from the error-correcting function of the full court. When a court sits en banc, the concern for adhering to a past resolution of an issue in deference to settled expectations, which underpins the doctrines of law of the case and law of the circuit, must give way to the institutional interest in correcting a precedent-setting error of great public import or a panel opinion that conflicts with Supreme Court precedent. See United States v. Rivera-Martinez, 931 F.2d 148, 151 (1st Cir. 1991) (noting that law of the case doctrine does not apply when "controlling authority has since made a contrary decision of the law applicable") (internal quotes and citations omitted); see also Irving II, 49 F.3d at 834 (acknowledging

---

[6] Citing to Block v. Neal, 460 U.S. 289, 294 (1983), and Indian Towing Co. v. United States, 350 U.S. 61, 64 (1955), the plaintiff suggests that the Court has accepted similar "concessions" on the discretionary function question. The Court's statements in Block and Indian Towing cannot bear the weight that the plaintiff loads upon them. These statements merely clarify that neither case implicated the discretionary function exception.

that the law of the circuit rule would not apply in the face of a contrary en banc opinion).

We are aware that the Eighth Circuit appears to have suggested otherwise. See Robertson Oil Co. v. Phillips Petrol. Co., 14 F.3d 373 (8th Cir. 1993) (en banc). The Robertson majority held that the law of the case doctrine precluded it from revisiting holdings from two earlier panel decisions because the full court had denied contemporaneous suggestions for en banc rehearings after the adjudication of both the first and second appeals. See id. at 376 n.5, 383, & n.13. We decline to follow Robertson for two reasons. First, in this case, unlike in Robertson, the en banc court was not invited to review any of the earlier panel decisions on a contemporaneous basis, and thus, did not decline to do so.[7] Second - and more important - to the extent that the Robertson majority's reasoning rests on mechanically applying the law of the case doctrine to the decisions of earlier panels across the board, it too narrowly cabins the proper purview of a court sitting en banc. See id. at 386-88 (Beam, J., with whom Bowman and Loken, JJ., join, dissenting).

Nor does the decision in Van Gemert v. Boeing Co., 590 F.2d 433 (2d Cir. 1978) (en banc), create an obstacle to en banc review of a prior panel decision. There, the Second Circuit suggested that the en banc court is free to overturn prior panel decisions unless doing so would seriously and unfairly prejudice the party that had benefitted from the earlier ruling. See id. at 436-37 n.9 (stating in dictum that "sitting en banc, we may overrule any panel decision that a

---

[7] In all events, we consider denials of rehearing en banc a very weak justification for a strict application of the law of the case doctrine. Denials of suggestions for rehearing en banc are pure exercises of discretion, and, as such, the grant or denial of rehearing en banc is the functional equivalent of a grant or denial of certiorari by the Supreme Court. Such actions make no statement about the full court's view on the merits of a claim it declines to hear. See Missouri v. Jenkins, 515 U.S. 70, 85 (1995).

majority of the active judges believes was wrongly decided, unless a party would be seriously prejudiced as a result"). Even were we prepared to adopt this formulation of the rule - a matter which we leave for another day - it would not preclude us from reviewing the holdings of Irving I and Irving II. As we have noted, the discretionary function exception implicates the subject matter jurisdiction of federal courts. Prejudice to a party, while always regrettable, cannot furnish a viable rationale for overlooking a federal court's lack of power to grant a remedy in the first place.

III. THE DISCRETIONARY FUNCTION EXCEPTION

Having cut a swath through the procedural thicket, we turn to the government's discretionary function defense. In the process, we afford plenary review to the question of whether the discretionary function exception applies. See National Union Fire Ins. v. United States, 115 F.3d 1415, 1417-18 (9th Cir. 1997), cert. denied, 118 S. Ct. 1053 (1998); Fisher Bros. Sales, Inc. v. United States, 46 F.3d 279, 282 (3d Cir. 1995) (en banc).

In the Court's words, "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee - whatever his or her rank - are of the nature and quality that Congress intended to shield from tort liability." United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 813 (1984). To respond to this inquiry, we first must identify the conduct at issue and then determine whether that conduct is discretionary. See Gaubert, 499 U.S. at 322. Even if this hurdle is cleared, the discretionary function exception still does not attach unless the exercise of discretion involves (or, at least, is susceptible to) policy-related judgments. See id. at 322-23.

A. The Statutory and Regulatory Regime.

In this instance, the plaintiff claims that workplace inspections, negligently performed by OSHA compliance officers, proximately caused her injuries. In analyzing the

nature of this conduct, we begin with the language of the OSH Act because "it will most often be true that the general aims and policies of the controlling statute will be evident from its text," id. at 324, and, in turn, these aims and policies will offer valuable insights into the nature of the conduct.

In relevant part, the OSH Act authorizes the Secretary of Labor to "inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein . . . ." 29 U.S.C. § 657(a). Under this authority, OSHA conducts both programmed general administrative inspections - known in the bureaucratic argot that OSHA so readily attracts as "full-scope" or "wall-to-wall" inspections - and more focused efforts pinpointed to threats of imminent danger.[8] Aside from a reasonableness limitation on the time and manner of inspections, the statute places virtually no constraint on the Secretary's discretion to conduct such inspections in any way that she deems fit. See Donovan v. Dewey, 452 U.S. 594, 601 (1981).

Comparison of this language to a parallel provision in the Federal Mine Safety and Health Act (MSH Act), 30 U.S.C. § 801 et seq., another health and safety statute administered by the Secretary of Labor, strongly suggests that Congress's choice of words was no accident. In defining the Secretary's responsibilities regarding mine inspections, the

---

[8] Under a different provision of the OSH Act, 29 U.S.C. § 657(f)(1), the Secretary "shall" conduct an inspection if a complaint by an employee about hazards in a particular workplace furnishes sufficient justification for an investigation. The scope of such inspections typically is limited to reviewing the hazardous conditions outlined in the complaint, see, e.g., Trinity Indus., Inc. v. OSHRC, 16 F.3d 1455, 1460 (6th Cir. 1994), although there are exceptions permitting broader inquiry if particular circumstances warrant, see id. at 1461. The 1975 and 1978 inspections of the Somersworth Shoe plant were both general administrative inspections performed under the aegis of § 657(a) and did not involve § 657(f)(1).

MSH Act provides that, in order to determine whether "an imminent danger exists" in a mine and "whether there is compliance with the mandatory health or safety standards or with a citation, order, or decision" issued under applicable law, "the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year." 30 U.S.C. § 813(a) (emphasis supplied). For our purposes, the stark differences between the inspection provisions of the MSH Act and those of the OSH Act are extremely significant. Whereas Congress was careful to mandate comprehensive inspections in the MSH Act, it left the scope and detail of OSH Act inspections to the Secretary's discretion. Had Congress wished to impose upon OSHA an obligation to inspect every corner of every plant that it visited, we think it is highly likely that Congress would have expressed its intention by choosing language comparable to that which it used in crafting the MSH Act.[9]

We recognize that, by its plain terms, the OSH Act confers discretion only upon the Secretary, not upon compliance officers - and it is the latter's conduct that concerns us. Nevertheless, the legislative rules governing the authority of compliance officers mimic the statute and grant these officials broad discretion over the scope, manner, and detail of general administrative inspections. The regulations' stated goal is "to set forth general policies for enforcement of

---

[9] This very distinction led the Supreme Court to impose an administrative warrant requirement for nonconsensual OSHA inspections, while refusing to do so for inspections under the MSH Act. Compare Marshall v. Barlow's, Inc., 436 U.S. 307, 321-24 (1978) (grounding its holding in the boundless discretion conferred by the OSH Act) with Dewey, 452 U.S. at 603-04 (distinguishing Barlow's and hypothesizing the greater rigidity of the MSH Act's inspection program obviated need for a warrant requirement). While the warrant requirement has no direct bearing on the Secretary's discretion over the scope, manner, and detail of a particular inspection, we believe that the Court's method of approach and its overall appraisal of the two safety statutes is instructive.

the inspection, citation, and proposed penalty provisions of the Act." 29 C.F.R. § 1903.1. Echoing the language of 29 U.S.C. § 657(a), section 1903.3 of the regulations confers upon compliance officers the unbridled power, subject only to limits of reasonableness, to enter workplaces, inspect any piece of equipment or other pertinent item, and interview any person in order to carry out the Secretary's statutory mission. See 29 C.F.R. § 1903.3(a).

To be sure, the regulations contain a sprinkling of mandatory directives. See, e.g., id. at § 1903.7 (obligating compliance officers, inter alia, to present their credentials at the start of an inspection, to use "reasonable precautions" when taking photographs and samples, to wear appropriate protective clothing, to avoid "unreasonable disruption" of the workplace, and to "confer with the employer" in order to inform him of "any apparent safety or health violations disclosed by the inspection"). Save for these and, for our purposes, other similarly innocuous details, the regulations neither mandate a particular modus operandi for conducting inspections nor otherwise materially restrict compliance officers' flexibility. Of particular importance, the regulations do not prescribe any specific regimen governing the scope or detail of general administrative inspections performed by compliance officers.

B. The Nature of the Action.

Under the jurisprudence of the FTCA, a function is non-discretionary only when a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." Gaubert, 499 U.S. at 322 (quoting Berkovitz, 486 U.S. at 536); accord Williams v. United States, 50 F.3d 299, 309-10 (4th Cir. 1995) (applying discretionary function bar because applicable regulations did not mandate a specific course of action for agent to follow when engaging managerial and custodial services); Layton v. United States, 984 F.2d 1496, 1502-03 (8th Cir. 1993) (holding that, in the absence of specific guidelines, the manner of inspection is a matter of discretion, and distinguishing situations "in which

[a] government inspector is controlled by precise regulations establishing specific steps he is required to perform in his inspections"); Cooper v. American Auto. Ins. Co., 978 F.2d 602, 612 (10th Cir. 1992) (holding that discretionary function exception bars negligent investigation claim absent any statute or "regulation mandating particular inquiries to be made or methods of making them"). Given the considerable leeway afforded to compliance officers under the statutory and regulatory mosaic, general administrative inspections conducted by OSHA compliance officers would seem to fit comfortably within the discretionary function exception. Indeed, two of our sister circuits have so held, see Judy v. United States, 864 F.2d 83, 84 (8th Cir. 1988); Galvin v. OSHA, 860 F.2d 181, 184 (5th Cir. 1988), and none has demurred.

The Irving I panel, though clearly recognizing the discretionary nature of the authority granted by the statute and regulations, 909 F.2d at 603, nevertheless held that a further factual inquiry was needed to ascertain whether some less formal protocol "left the compliance officers with no policy-level discretion," id at 603. We now reject the panel's predictive analysis

To begin with, the Irving I panel appears to have accepted the plaintiff's position that, because the 1975 and 1978 inspections were "general inspections," the compliance officers' conduct was not discretionary. This conclusion suggests that the panel further assumed that general administrative inspections fall outside the scope of 29 U.S.C. § 657(a) and 29 C.F.R. § 1903.7. See Irving I, 909 F.2d at 603. We cannot accept this construct. As our explication of the statute and regulations demonstrates, see supra Part III(A), general administrative inspections are conducted under the auspices of section 657(a). The relevant regulations, moreover, explicitly grant compliance officers the same broad discretion enjoyed by the Secretary with respect to such inspections. Had the Irving I court not overlooked this important fact, its own logic quite likely would have led it to

hold, as we do today, that the discretionary function defense prevails. See Irving I, 909 F.2d at 603 (acknowledging that the statute and regulations, considered alone, appear to confer discretion for covered inspections, but questioning whether they governed the actions of compliance officers).

This error materially altered the decisional calculus. Because the Irving I panel misconstrued the applicability of the regulations to the conduct of compliance officers, it failed properly to consider when a court might justifiably consult informal policy statements in order to shed light on whether an act is discretionary. Of course, as Irving I suggests, informal agency rules and similar pronouncements may at times bind agency personnel for the purposes of discretionary function exception analysis. See Gaubert, 499 U.S. at 324. Hence, courts may consult such sources in appropriate cases to determine whether a particular function is (or is not) discretionary. See, e.g., Domme v. United States, 61 F.3d 787, 791 (10th Cir. 1995) (applying discretionary function bar when none of the relevant statutes, regulations, or internal agency guidelines specified the "precise manner" in which the Department of Energy was to conduct safety appraisals); Autery v. United States, 992 F.2d 1523, 1529 (11th Cir. 1993) (similar, re park inspections). Occasionally, such an informal policy will tip the scales. See McMichael v. United States, 856 F.2d 1026, 1033-34 (8th Cir. 1988) (holding that when internal agency guidelines directed government inspectors to follow a detailed regime, discretionary function exception did not apply). Still, recognizing that informal sources sometimes may assist courts in deciding whether a function is discretionary is one thing; synthesizing when and how they may do so is another.

Gaubert itself provides some clues as to when courts ought to consult informal rules. There, the Justices indicated that such rules become significant to the discretionary function analysis when an agency promulgates "regulations on some topics, but not on others," or when it relies on "internal guidelines rather than on published regulations" to

govern official conduct. Gaubert, 499 U.S. at 324. The Court contrasted these situations with those in which agencies announced policy mainly through rulemaking and/or adjudication. See id. Thus, if an agency establishes policy primarily by promulgating legislative rules, and if those legislative rules unambiguously define the nature of the challenged conduct, the discretionary function inquiry is at an end.

Of course, this formulation requires that the legislative rules be unambiguous and that they define the proper level of conduct. We can well imagine that resort to informal indicia may be justified either when an agency's legislative rules define the conduct of some employees, but not others (e.g., when the regulations define the conduct of a regional official but not of a subordinate whose negligence is alleged to have caused the plaintiff's injury), or when legislative rules create ambiguity (e.g., when the regulations interweave precatory with quasi-mandatory language, as in Kelly v. United States, 924 F.2d 355, 360-61 (lst Cir. 1991)). This case, however, involves neither of these circumstances, nor does it involve any other fairly comparable situation. Here, the regulations flow rationally from the enabling statute, directly address the level of conduct at issue, and unambiguously grant OSHA compliance officers discretion over the scope, manner, and details of conducting inspections. Where, as here, the statute and the applicable regulations clearly speak to the nature of the conduct, there is no occasion to consult informal rules.

In this case, moreover, our conclusion would remain unaffected even were we obliged to go beyond formal sources, for, as the regulations adumbrate, OSHA's informal rules point unerringly in the same direction. At the relevant time, OSHA published (and still publishes) a field operations manual (the Manual), which is a compilation of agency guidelines. These guidelines are intended to limn the agency's operating procedures. The Manual devotes an entire chapter to describing "General Inspection Procedures." Discussing the

responsibilities of compliance officers, this chapter states in pertinent part:

> The conduct of effective inspections requires identification, professional evaluation, and accurate reporting of safety and health conditions and practices. Inspections may vary considerably in scope and detail, depending upon the circumstances of each case.

From that point forward, the chapter essentially mirrors the requirements set forth in the regulations. Importantly, the Manual contains no specific prescription mandating OSHA inspectors to proceed item by item or to cover every nook and cranny of a facility during a general administrative inspection. Consequently, even if it were necessary to consult informal rules in this instance - and we stress that it is not - those rules place the compliance officers' actions squarely in the maw of the discretionary function exception.[10]

Of course, the Irving I panel directed the district court to determine OSHA policy by looking beyond the clear statements in the statute, the regulations, and the agency's internal guidelines. 909 F.2d at 603-05. In the circumstances of this case, that directive should not have issued. The Gaubert Court instructed inferior courts to look to the requirements set forth by "established governmental policy"

---

[10] The dissent's suggestion that this case requires a different result simply because the Area Director instructed the compliance officers to conduct "wall-to-wall" inspections at the Somersworth Shoe plant, see Post at 62-63, is unconvincing. As we have already explained, "wall-to-wall" inspections are no more than the general administrative inspections described by the statute, regulations, and guidelines - nothing in the record supports an assertion that the Area Director's order meant anything else. Thus, the consequences of the Area Director's instructions regarding a wall-to-wall inspection are exactly the same as if the compliance officers independently had checked the general administrative inspection schedule and noted that the Somersworth Shoe plant was due for a general inspection.

in mounting a discretionary function inquiry. Gaubert, 499 U.S. at 324 (emphasis supplied).

The Court specifically identified only statutes, regulations, and agency guidelines as competent sources for determining government policy. See id. Although we do not suggest that those items invariably will be the exclusive sources for determining established policy, it bears remembering that the Court's recognition that informal rules may be a relevant source took place against a background understanding, both in administrative law generally and in the OSHA context specifically, that agencies typically make authoritative informal statements of policy positions through published interpretive rules or enforcement guidelines. See Martin v. OSHRC, 499 U.S. 144, 157 (1991). Although anecdotal testimony sometimes may furnish clues regarding the nature of agency policy, it is usually a last-ditch resort. See Kenneth C. Davis & Richard J. Pierce, Jr., 3 Administrative Law Treatise § 17.3, at 108 (3d ed. 1994) (placing unwritten rules and "officer's habit" at the bottom of a list of twelve sources, headed by "legislative rules," and including interpretative rules, published guidelines, published policy statements, orders, and written but unpublished guidelines, and noting that the power to limit officer discretion decreases "as the reader proceeds down the list").

The most obvious reason why such sources command less weight is because it matters who speaks. To determine what is agency policy, courts customarily defer to the statements of the official policymaker, not others, even though the others may occupy important agency positions. See Martin, 499 U.S. at 152-53; see also Director, OWCP v. Eastern Associated Coal Corp., 54 F.3d 141, 147 (3d Cir. 1995). This case is a suitable vehicle for application of the principle. Congress has the legal authority to render a function either discretionary or obligatory, and it has delegated that power to the Secretary, not to OSHA's area directors or compliance officers. Hence, we decline to accord decretory significance to the area director's or compliance officers'

thoughts on OSHA policy requirements, especially when the plaintiff insists on interpreting this testimony in a manner contrary to both the express statements of Congress and the agency's institutional pronouncements. Accord Valdez v. United States, 56 F.3d 1177, 1179-1180 (9th Cir. 1995) (refusing to credit agency employees' testimony that agency rules were mandatory when plain text of guidelines belied that interpretation; concluding, moreover, that discretionary function exception barred action).

We add a coda. As the Irving I panel itself intimated, 909 F.2d at 604-05, the trial testimony does not unequivocally establish that OSHA imposed on its officers a mandatory duty of inspecting every piece of equipment in a workplace. Rather, the testimony on which the plaintiff relies (and upon which the district court premised its holding) is at best ambiguous - and this erodes any conceivable legitimacy that it otherwise may have had as an expression of agency policy. Thus, even setting aside the statute, regulations, and Manual, we do not believe that any statement in the trial record suffices to support the plaintiff's theory that OSHA had a policy of exhaustively inspecting every machine.[11]

By way of illustration, consider the following exchange, which is perhaps the plaintiff's best evidence, between her counsel and OSHA's area director, F. Richard Amirault:

> Q. And, by the way, the obligation and procedure of your department is to note and cite specific violations, is it not?

---

[11] The dissent takes us to task for being insufficiently respectful of the trial court's findings of fact. See Post at 74-81. The dissent overlooks, however, that the lower court's crucial findings were grounded in an erroneous legal framework imposed by Irving I and Irving II. Under such circumstances, an appellate court should not defer to a trial court's factfinding. See Vecinos de Barrio Uno v. City of Holyoke, 72 F.3d 973, 978 (1st Cir. 1995); Juno SRL v. S/V Endeavour, 58 F.3d 1, 4 (1st Cir. 1995).

A. To note - document and - identify and document specific hazards, yes.

Q. Machine by machine by machine?

A. As far as we can see.

Q. Hazard by hazard by hazard?

A. As can be observed.

To begin with, the passage is internally ambiguous in at least one critical way. Given the tenor of Amirault's answers, it can be construed to mean that inspectors were obligated to note and document every hazard that they saw associated with the machines that they in fact inspected. At no point did Amirault state, directly or by necessary implication, that there was a policy to look at every machine.

Furthermore, even if we interpret this passage favorably to the plaintiff, it is inadequate as a matter of law to support the plaintiff's position. Where, as here, the express statements of Congress and the agency occupy the field, trial testimony by a witness must, if it is to carry any weight, somehow reconcile the witness's understanding of policy with that authority. At the very least, there must be an indication in the record that the witness demonstrated his awareness of the agency's formal policy statements, but nevertheless had some other articulable basis that supported his understanding of agency policy.

In the absence of such evidence, the most that is suggested by a passage such as the one quoted above is that the OSHA area director and the compliance officers who inspected the Somersworth Shoe plant subjectively exercised, or intended to exercise, the discretion conferred upon them by law in a particular manner, or, alternatively, that they were unaware of the existence of such discretion. We know from Gaubert that the subjective intent of an agency actor is irrelevant to conducting a discretionary function analysis. See Gaubert, 499 U.S. at 325. Rather, the focus of the inquiry is on "the nature of the actions taken and on whether they are

susceptible to policy analysis." Id. The OSHA officers' ambiguous testimony in this case is by itself insufficient to alter the nature of the actions as defined by authoritative formal and informal sources.

There are also passages in the trial record where Amirault refers to OSHA guidelines. This testimony further undermines the plaintiff's theory. For example, when plaintiff's counsel asked Amirault about the Manual, Amirault responded that it was OSHA's "procedural bible" and, as such, described his staff's "operating procedure." He unequivocally stated that inspections were conducted pursuant to directions set forth by the Manual:

> Q. So that for any general or regular inspection at least they [i.e., the compliance officers] would simply follow the manual and the objective standards of OSHA?
>
> A. Right. Following the manual, the FOM, Field Operations Manual.

This cinches the matter, for, as we have already noted, the Manual provides no support for the plaintiff's theory.

Our conclusion is further confirmed by other statements made by Amirault. Consider, for instance, the following exchange:

> Q. And those programmed inspections, as I understand it, would be your random way of just doing spot checks on an entire plant without advance notice?
>
> A. Yes, that's correct.
>
> Q. And those are the type of inspections that your agency performed on the Somersworth plant in 1975 and 1978?
>
> A. Yes.

Q. We've learned through the depositions that those two inspections were what is known as a wall-to-wall inspection, is that correct?

A. I'm going to say yes.

Q. And in such an instance, when one of your safety men goes to a plant, he would spend the whole day or whatever time was necessary to inspect the entire plant for safety hazards.

A. He would be able to walk through, yes.

Read naturally, this passage indicates that general administrative inspections constitute nothing more than "walk throughs" that involve random spot checks. As such, it flatly contradicts the suggestion that the inspectors "could not choose simply to spot check certain areas," Irving I, 909 F.2d at 604, and it places the inspection scheme squarely within the Varig Airlines regime. On any reading, the passage does not come close to establishing that OSHA had a strict policy of requiring inspectors to look in detail at every machine.

C. Policy-Based Discretion.

Having confirmed the existence of discretion on the compliance officers' part, what remains is to examine whether that discretion is grounded in policy - a question that none of the prior panels reached. We believe that it is.

The plaintiff contends that the discretionary function defense is doomed because the United States failed to adduce any evidence to support the proposition that OSHA inspectors' actions are grounded in policy. This argument lacks force. When a function is discretionary, there is a presumption that "the agent's acts are grounded in policy when exercising that discretion." Gaubert, 499 U.S. at 324. Hence, the United States has no burden of production; it may rest, as it did here, on the Gaubert presumption.

The plaintiff next endeavors to overcome the Gaubert presumption by pointing to trial testimony by OSHA employees and noting that they purportedly failed to articulate policy justifications for their actions. But Gaubert requires only that a government agent's actions be "susceptible" to policy analysis, and insists that courts must disregard analyses that rely on subjective intent to determine whether a discretionary choice is policy-driven. See id. at 325. Because the plaintiff offers no concrete challenge to the position that OSHA compliance officers' actions are policy-driven, the Gaubert presumption remains intact.

Even beyond the presumption, we believe that the discretion granted to OSHA inspectors is deeply rooted in policy considerations. The OSH Act's purpose is to provide for a satisfactory standard of safety, not to guarantee absolute safety. See Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion) (discussing legislative history); Donovan v. General Motors Corp., 764 F.2d 32, 35-36 (lst Cir. 1985) (same); cf. Union of Concerned Scientists v. NRC, 824 F.2d 108, 118 (D.C. Cir. 1987) (citing Industrial Union and stating, in the context of nuclear regulation, that an "adequate protection" standard "need not, and almost certainly will not" be a level of "zero risk"). A corollary to this observation is that OSHA may legitimately devote its limited enforcement resources to monitoring workplaces and working conditions that pose the most serious threats to worker health and safety. OSHA has done so in part, for example, by adopting inspection priorities[12] and an administrative plan to govern programmed general inspections. See, e.g., Industrial Steel Prods. Co. v. OSHA, 845 F.2d 1330, 1333-34 (5th Cir. 1988) (describing OSHA site selection criteria for programmed inspections).

---

[12] The Manual establishes OSHA's inspection priorities in descending rank order as follows: imminent danger, fatality/catastrophe investigations, investigation of complaints, and regional programmed inspections.

The function of an OSHA compliance officer is an integral part of OSHA's enforcement policies. When conducting inspections under the auspices of an administrative plan, OSHA compliance officers are expected to study the layout of the facility they are about to investigate, to review its health and safety records, and to interview employer and employee representatives during the inspection about working conditions. One might expect that as a result of such study, OSHA inspectors will make daily judgments about what risks and safety issues most urgently require their attention. At bottom, OSHA inspectors must visit numerous workplaces, all of which present different challenges and issues, and they simply cannot be expected to inspect every item in every plant.[13] The day-to-day decisions made by compliance officers thus further OSHA's enforcement policy of ensuring adequate safety in workplaces with a view toward efficient and effective use of limited enforcement resources, and are thus grounded in policy. Cf. Gaubert, 499 U.S. at 331-33 (explaining that day-to-day decisions of thrift regulators were grounded in policies underlying thrift regulation statutes).

We are not persuaded by the plaintiff's contention that all inspections ought to be painstakingly comprehensive because individual companies rely on OSHA inspections to improve their health and safety conditions. The OSH Act, in no uncertain terms, places primary responsibility for workplace safety on employers, not on the federal government. See 29

---

[13] The plaintiff's contrary argument espouses the logic of zero tolerance for any kind of risk. The indiscriminate application of this logic as a guide for policy has met with considerable criticism. See, e.g., Stephen Breyer, Breaking the Vicious Circle 11-19 (1993). Although the political branches legitimately may decide to impose "zero risk" standards, see, e.g., NRDC v. EPA, 824 F.2d 1211, 1215-16 (D.C. Cir. 1987), courts must be hesitant to impose such a gloss in the absence of an explicit congressional command or proper grant of agency discretion, see, e.g., Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1214-15 (5th Cir. 1991).

U.S.C. § 654(a); Reich v. Simpson, Gumpertz & Heger, Inc., 3 F.3d 1, 4 (1st Cir. 1993).

IV. CONCLUSION

This case has disturbing aspects. The government's inspectors appear to have been negligent and the plaintiff suffered grievous harm. Arrayed in opposition, however, is the core policy that underlies the discretionary function exception: an abiding concern about exposing the government to far-flung liability for action (or inaction) in situations in which it has reserved to its own officials the decision about whether or not to act. Even if the decision may seem wrong in retrospect, or if its implementation is negligent, such decision-making by its nature typically requires a balancing of interests (e.g., how to deploy scarce government resources in the accomplishment of worthwhile - but expensive - public needs). Congress reasonably struck this balance by requiring that, ordinarily, liability will not inhere absent an authoritative decision that a specific act should become a governmental responsibility. Under this model, the random and uncodified practices of a local supervisor cannot create the kind of specific obligation that gives rise to liability. Were the law otherwise, there would be scant likelihood of precision or uniformity, and local supervisors would have a perverse incentive to refrain from laying down any rules at all.

We need go no further. Even though exceptions to the FTCA's waiver of sovereign immunity are construed narrowly, they are not to be ignored. Here, Congress clearly expressed its intent through unequivocal statutory language, and the Secretary of Labor, as Congress's delegate, adopted legislative rules which faithfully adhere to that monition. The statute and regulations, fairly read, bring the case within the compass of the FTCA's discretionary function exception, and the agency's internal guidelines buttress this positioning. Accordingly, we must grant the government the immunity that Congress envisioned. We regret only the plaintiff's unfortunate accident and the added suffering she has endured

due to the inordinate delay and erratic decision making that spawned two decades of needlessly protracted litigation.

Reversed. No costs.

- Separate Opinions Follow -

STAHL, Circuit Judge, (concurring). Despite strong reservations, I joined the withdrawn panel opinion, see Irving v. United States, 1998 WL 152941 (1st Cir. Apr. 8, 1998), because I was then bound by the interpretation of the discretionary function exception set forth in Irving v. United States, 909 F.2d 598 (1st Cir. 1990) (Irving I). Having endorsed the decision of the en banc court to revisit Irving I, I now concur in the view, ably stated in Judge Selya's majority opinion, that the discretionary function exception forecloses plaintiff's negligent inspection claim. Although the issue is close and no Supreme Court case is directly on point, I do not believe that, in a regulatory context that is so obviously discretionary, Congress would intend to make actionable under the FTCA an ignored instruction from a superior to a subordinate that the subordinate perform a function that is otherwise discretionary (for policy-based reasons). To my mind, an ignored instruction of this sort is better conceptualized as an abuse of the discretion conferred by the regulatory regime. Such abuses of discretion are not within the reach of the statute. See 28 U.S.C. § 2680(a).

BOWNES, Senior Circuit Judge, with whom LIPEZ, Circuit Judge, joins (dissenting). The majority opinion fundamentally misconstrues controlling Supreme Court precedent in analyzing the discretionary function exception to the Federal Tort Claims Act ("FTCA"). The majority is concerned that permitting Irving's claim to succeed would undermine OSHA's broad discretion in deciding how to implement its enforcement policy. No one disputes that the agency as a whole retains considerable discretion. The problem is that the majority undertakes its analysis from the wrong vantage point.

As the Supreme Court has made clear, the appropriate focus is the degree of choice that was in fact available, not to the agency as a whole but to the specific "acting employee" whose conduct is the basis for the tort action. Berkovitz v. United States, 486 U.S. 531, 536 (1988). The discretionary function exception shields the government from lawsuits challenging governmental action only if that specific action was based on discretion grounded in policy. See id. The exception was intended to protect only such specific policy-based judgment. The present case involves no second-guessing of protected policy-making.

A parallel problem is the majority's mischaracterization of Gail Irving's position. Irving does not contend "that all [OSHA] inspections ought to be painstakingly comprehensive." Maj. Op. at 34. Her claim, properly construed, is that once inspectors have been ordered by their supervisor to perform a wall-to-wall inspection, they must do so with due care. Irving argues that if the inspectors had followed their superiors' orders, she would not have had her scalp torn from her head. Thus, she contends that the negligent inspections were not protected by the discretionary function exception because the inspectors had "no rightful option but to adhere to the directive" of their superior officer. See Berkovitz, 486 U.S. at 536.

Because in my view the district court properly concluded that the exception does not bar Irving's claim,[14] I respectfully dissent.

---

[14] The majority finds to the contrary and concludes that, because of the discretionary function exception, it is without jurisdiction to entertain Irving's suit. In contrast, the dissent from the withdrawn panel opinion was based on the belief "that state law, properly applied, requires the entry of judgment in the government's favor." Irving v. United States, 1998 WL 152941, *37 (1st Cir. 1998) (Irving IV). It did not discuss the discretionary function exception at all or, indeed, any aspect of the panel's treatment of federal law. The dissent from the panel opinion mentioned not a word about the purported "precedent-setting error of great public import," maj. op. at 13, or about the overriding importance of the discretionary function exception's "implicat[ion of] the subject matter jurisdiction of federal courts," id. at 15. I find it remarkable that, until the en banc opinion issued, nothing was said about the lack of jurisdiction, because of the discretionary function exception, by the dissenting judge who is the writer of the majority opinion. Surely the framework of the case did not preclude comments about an issue that is now the basis for the majority's opinion. As the majority itself stresses on page 11 of its opinion, "[f]ederal courts, being courts of limited jurisdiction, have an affirmative obligation to examine jurisdictional concerns on their own initiative." Thus, contrary to the majority's protestations at page 3 n. 1, members of the prior panel were certainly not precluded from commenting on the jurisdictional issue that the en banc court now raises. I do not question the court's authority to call sua sponte for en banc review, but I question its judgment and wisdom in doing so here.

I

The FTCA, except for certain enumerated exceptions, "waives the Government's immunity from suit in sweeping language." Smith v. United States, 507 U.S. 197, 205 n.1 (1993) (quoting United States v. Yellow Cab Co., 340 U.S. 543, 547 (1951)). The FTCA authorizes suits against the United States for damages

> for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant under the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). The FTCA is a "broad waiver of sovereign immunity," which "generally authorizes suits against the United States for damages" that fit within its description. Berkovitz, 486 U.S. at 535. This waiver applies unless the government is protected by one of several specifically enumerated exceptions to the FTCA.[15] Id.; see 28 U.S.C. § 2680.

The majority opinion relies upon the discretionary function exception, which provides that no liability shall lie for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

---

[15] Thus it is the government's burden to demonstrate that an exception applies. In the present case, the burden of proof should be on the government to show that OSHA explicitly delegated to inspectors Chase and Ritchie the discretion to determine how thoroughly to inspect the Somersworth Shoe plant. The majority opinion implicitly flips this burden on its head, and requires the plaintiff essentially to disprove the exception's applicability.

Congress's purpose in enacting the discretionary function exception was to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." United States v. Varig Airlines, 467 U.S. 797, 814 (1984); see also Berkovitz, 486 U.S. at 539. Thus, the exception was designed to protect government agents' exercise of policy-based discretion, to prevent individual government agents from having to look over their shoulders worrying about a potential lawsuit when they are truly exercising policy-based discretion.

The same protective rationale does not apply when government agents are merely carrying out mandatory directives, whatever the basis of those mandatory orders. If a government employee has no choice about how to act - whether because a statute, regulation, or agency policy mandates particular actions for all such employees, or for whatever other reason (here, because his supervisor explicitly ordered him to conduct a wall-to-wall inspection) - then "there is no discretion in the conduct for the discretionary function exception to protect." Berkovitz, 486 U.S. at 536.

Thus, the Court has set forth a two-prong test to determine whether the discretionary function exception applies. First, the acting government employee must be exercising discretion, when he engages in the challenged conduct. And second, even when government agents are exercising discretion, their conduct is immune from tort suits only when that discretion is based on policy. The exception "protects only governmental actions and decisions based on considerations of public policy." Id. at 537.

II

The majority misses an important part of the Supreme Court's analysis of the discretionary function exception: from what vantage point should the court view the conduct of government agents? In this case, what level of OSHA employees is the proper focus for our attention? "The proper

question to ask is not whether the Government as a whole had discretion at any point, but whether its allegedly negligent agents did in each instance." In re The Glacier Bay, 71 F.3d 1447, 1451 (9th Cir. 1995). Instead, the majority focuses on the discretion of the agency as a whole, at the command level.[16] This fundamental misconception of the discretionary function exception infects the majority's entire analysis. It leads the majority to misunderstand Irving's claim and to misapply the law governing the discretionary function exception.

A

Section 2680(a) refers to two different types of discretion: (1) the "performance . . . [of] a discretionary function or duty on the part of a federal agency" and (2) such "performance . . . on the part of . . . an employee of the Government." The majority's analysis centers on the first type. Citing both the statute and the regulations, it emphasizes that the agency as a whole had discretion in carrying out its statutory inspection functions. Of course it did. If the plaintiff had challenged OSHA's hypothetical decision to conduct inspections upon only a random sample of factories, or a supervisor's decision to omit Somersworth Shoe from that sample, or an order that the inspectors conduct only a spot check and not a wall-to-wall inspection of Somersworth Shoe, then I would agree with the majority that her claim must be dismissed based on the discretionary function exception.[17]

But that is merely the first type of discretion addressed in § 2680(a) ("performance . . . [of] a discretionary function or

---

[16] See Part III, infra.

[17] But that is not what this case is about. Irving does not challenge area director Amirault's discretionary decision that the inspectors perform a wall-to-wall inspection of Somersworth Shoe. She applauds it, and wishes the inspectors under Amirault's supervision had carried out his mandate. It is the inspectors' negligent execution of Amirault's mandatory order to them that Irving challenges.

duty on the part of a federal agency"). The plain language of the statute requires a distinction between this type of discretion and the second type: "performance [of] . . . a discretionary function or duty on the part of . . . an employee of the Government." 28 U.S.C. § 2680(a). The latter is the focus of Irving's complaint.

Here, OSHA exercised its discretion, at the command level of the agency, about how to allocate its scarce resources. It delegated to each area office a certain amount of discretion to conduct various types of inspections. Pursuant to that delegation, as Irving alleged and the district court found, the area office here decided to deploy its inspection resources by calling for less than complete inspections of some factories but, in the case of Somersworth Shoe, by requiring wall-to-wall inspections of its New Hampshire plant. The area director instructed two members of his staff, inspectors Chase and Ritchie, to examine every machine in the plant. Irving v. United States, 942 F. Supp. 1483, 1491 & n.8 (D.N.H. 1996).

Thus, the agency's discretionary policy decisions were completed as soon as the area director made his "wall-to-wall" decision; the agency had committed itself to this undertaking, before the inspectors set foot on the premises of Somersworth Shoe. It was after these discretionary policy decisions had been completed that the inspectors negligently executed the agency's policy, giving rise to the injuries suffered by the plaintiff. At that point, Chase and Ritchie, the inspectors, had "no rightful option but to adhere to the directive" from their supervisor and examine every machine in the plant. Berkovitz, 486 U.S. at 536. The conduct of Chase and Ritchie "cannot appropriately be the product of judgment or choice, [so] there is no discretion in [their] conduct for the discretionary function exception to protect." Id.

B

The plain language of the statute is only one reason why the majority is wrong to focus only on the upper levels of the

agency - rather than the inspectors whose actions Irving is challenging - for determining whether the discretionary function exception applies. Controlling Supreme Court precedent likewise demonstrates the majority's error. The principal Supreme Court case explicating the discretionary function exception is Berkovitz v. United States, 486 U.S. 531 (1988).[18]

The Court's opinion exposes the majority's error in three different ways: (1) in the Court's analysis of the discretionary function exception, (2) in the Court's discussion of prior Supreme Court precedent, to harmonize those cases with the Berkovitz analysis, and (3) in the Court's application of its legal analysis to the facts of Berkovitz's claims. Because of the importance of the Berkovitz case, and because this court is duty-bound to faithfully apply Supreme Court precedent, I will discuss each of these in some detail.

1

The Berkovitz Court set forth clearly the mode of analysis that we should employ in cases such as this:

> The determination of whether the discretionary function exception bars a suit against the Government is guided by several established principles. This Court stated in Varig that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary

---

[18] Astonishingly, the majority opinion fails even to discuss this seminal case. The majority reaches back to overrule Irving I and Irving II but inexplicably fails to discuss the Berkovitz decision which prompted those opinions. In both Irving opinions, which were unanimous, we directed the district court to determine, in the light of Berkovitz, whether the discretionary function exception applied. The majority evidently thinks Berkovitz is now beside the point, at least for its purposes. The opinion mentions that the district court and a prior panel of this court relied on Berkovitz, but in rejecting those panel decisions, the majority does not itself discuss or distinguish - much less apply - the Supreme Court's analysis or holding in Berkovitz.

> function exception applies in a given case." In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice.

Id. at 536 (citation omitted) (emphasis added)

The Court's methodology, which was plainly not followed by the majority in this case, requires that we ask what "conduct" is "challenged" by the plaintiff in the particular case, determine which employee in the agency has engaged in that conduct, and then consider "whether the action is a matter of choice for the acting employee." Id.

The Court's focus on "the acting employee" is equally plain from the next passage of Berkovitz:

> [T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect. Cf. Westfall v. Erwin, 484 U.S. 292, 296-97 (1988) (recognizing that conduct that is not the product of independent judgment will be unaffected by threat of liability).[19]

---

[19] The Court's reference to Westfall recognizes the purpose of immunizing certain government conduct from ordinary tort liability. Unlike tort suits brought against non-governmental defendants, the Court does not want the possibility of being sued for negligence to chill a government official from exercising "independent judgment" when such is appropriately part of his or her job serving the public. See Varig Airlines, 467 U.S. at 814 (noting Congress' desire to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in

Id. (citation omitted; emphasis added).

The Court could not have been more clear that, when we examine whether there is "discretion in the [challenged] conduct for the discretionary function exception to protect," we must focus on the individual employee whose "conduct" is "challenged" by the plaintiff. Here, that is Chase and Ritchie. The challenged conduct is their failure to inspect the die-out machine that injured Irving, despite having been ordered by their supervisor to it inspect every machine. Where, as here, the acting employee has been ordered by his supervisor to proceed in a certain manner, and the plaintiff is seeking recompense for injuries resulting from that employee's failure properly to follow that command, then it is irrelevant that "the statute places virtually no constraint on the Secretary's discretion to conduct such inspections in any way that she deems fit," maj. op. at 17, or that OSHA's generally applicable "rules governing the authority of compliance officers mimic the statute and grant these officials broad discretion over the scope, manner, and detail of general administrative inspections," id. at 18.

Of course the Secretary and her top assistants have broad discretion in managing the agency's enforcement enterprise, as do any subordinate officials to whom that discretion is properly delegated. But this does not mean that front-line inspectors have any discretion once decisions have been made by their superiors in the hierarchy and a mandatory directive has been given to the inspectors.

The Court in Berkovitz moved on to the second prong of its analysis: even "assuming the challenged conduct involves an element of judgment," was that judgment based on policy? There, too, the Court looked at this question at the level of the individual whose actions are challenged by the plaintiff in the case at hand: "The exception, properly construed, . . . protects

---

social, economic, and political policy through the medium of an action in tort").

only governmental actions and decisions based on considerations of public policy. In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." Berkovitz, 486 U.S. at 537 (citation omitted; emphasis added). Again, the focus is on the particular "action challenged in the case" - the shoddy inspection by Chase and Ritchie - and not on whether the agency as a whole - or even a supervisor like Amirault - "exercise[s] . . . policy judgment." See id.; In re The Glacier Bay, 71 F.3d at 1451.

2

The Berkovitz Court next discussed prior Supreme Court precedent, to demonstrate how those prior decisions fit into the Court's analytical framework. This discussion again stresses the importance of keeping the analysis focused at the level of the acting government employee.

The Court first analyzed the actions challenged in Varig Airlines, namely, the FAA's negligence in certifying certain airplanes for operation, including its decision to certify the airplanes without first inspecting them.

> Congress had given the Secretary of Transportation broad authority to establish and implement a program for enforcing compliance with airplane safety standards. In the exercise of that authority, the FAA, as the Secretary's designee, had devised a system of "spot-checking" airplanes for compliance. Th[e Supreme] Court first held that the establishment of that system was a discretionary function within the meaning of the FTCA because it represented a policy determination as to how best to "accommodat[e] the goal of air transportation safety and the reality of finite agency resources."

Berkovitz, 486 U.S. at 537 (quoting Varig Airlines, 467 U.S. at 820). Applying this portion of the analysis to the present

case, OSHA's broad discretion in devising its methodology for conducting inspections, whether "spot-checking" or some other method, is protected under the discretionary function exception.

But the Court's analysis did not end there. Varig Airlines also held that the discretionary function exception protected "the acts of FAA employees in executing the 'spot-check' program," because under this program the employees "were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources." Varig Airlines, 467 U.S. at 820. The Berkovitz Court added the following explanation: "Thus, the Court [in Varig Airlines] held the challenged acts protected from liability because they were within the range of choice accorded by federal policy and law and were the results of policy determinations." Berkovitz, 486 U.S. at 538 (emphasis added).

This second set of actions - executing the "spot-check" program - is not analogous to the Irving situation. The crucial distinction is that Varig's spot-check protocol left the FAA's line-level employees with a "range of choice" based on "policy" judgments. In contrast, the OSHA inspectors in Irving were not executing a "spot-check" protocol; they were specifically ordered by their superiors to inspect every machine. They thus had zero "range of choice." Berkovitz, 486 U.S. at 538. They had no discretion, whether based on policy judgment or otherwise, to decide unilaterally during their inspection of the Somersworth plant not to inspect the die-out machine that caused Irving's injuries. These inspectors' shoddy execution does not involve "the necessary element of choice," grounded in policy, United States v. Gaubert, 499 U.S. 315, 323 (1991), that the discretionary function exception was intended to protect.

Berkovitz also analyzed Indian Towing Co. v. United States, 350 U.S. 61 (1955), as "illuminat[ing] the appropriate

scope of the discretionary function exception." Berkovitz, 486 U.S. at 538 n.3. The plaintiff in Indian Towing sued the government for failing to maintain a lighthouse in good working order. The Court stated that the initial decision to undertake and maintain lighthouse service was a discretionary judgment. See Indian Towing, 350 U.S. at 69. Thus, if the agency had instead exercised its discretionary judgment to decline such an undertaking, the government would be insulated from tort liability. This is analogous to OSHA's decision whether to undertake a wall-to-wall inspection of the Somersworth Shoe plant.

"The Court [in Indian Towing] held, however, that the failure to maintain the lighthouse in good condition subjected the Government to suit under the FTCA," because "[t]he latter course of conduct did not involve any permissible exercise of policy judgment." Berkovitz, 486 U.S. at 538 n.3. The failure by agency employees to exercise ordinary care in carrying out an undertaking that the government agency willingly undertook is not protected by the discretionary function exception. This latter aspect of Indian Towing is analogous to the OSHA inspections challenged in the present case.

3

A third aspect of the Berkovitz decision further undermines the majority's focus on the discretion permitted to be exercised by the highest levels of OSHA. In Part III of its opinion, the Court discussed the specific actions that the Berkovitz plaintiffs challenged. The Court's mode of analyzing each of the five possible claims illuminates how our court should have examined the applicability of the discretionary function exception.

The Division of Biologic Standards (DBS) of NIH had issued a license to Lederle Laboratories to produce a drug called Orimune. The plaintiffs alleged that DBS issued the license without first receiving certain data that the manufacturer was required to submit showing its compliance with regulatory safety standards. The Court held that the

discretionary function exception did not bar a cause of action based on this allegation, because the statute and regulations "require, as a precondition to licensing, that the DBS receive" that data, and DBS had "no discretion to issue a license without first receiving the required test data." Berkovitz, 486 U.S. at 542. The actor in Berkovitz was whatever level of the agency made the decision to issue the license. Viewing the facts from that vantage point, there was "no discretion . . . for the discretionary function exception to protect" because of the statutory mandate.

The plaintiffs in Berkovitz also alleged that DBS licensed Orimune without complying with other regulatory standards. The allegation was ambiguous and the Court explored three different possible interpretations.[20] Under a DBS regulation, DBS "may not issue a license except upon an examination of the product and a determination that the product complies with all regulatory standards." Berkovitz, 486 U.S. at 544. Thus, if the plaintiffs were "aver[ring] that the DBS licensed Orimune either without determining whether the vaccine complied with regulatory standards or after determining that the vaccine failed to comply, the discretionary function exception does not bar the claim." Id. at 544. This is because "[t]he agency has no discretion to deviate" from its "clear duty," i.e., from the procedures mandated by its own regulations.

The Court applied a different analysis to the third possible interpretation of the plaintiffs' claim: that the agency found Orimune to comply with regulatory standards but that the agency's conclusion was incorrect. This question "hinges on whether the agency officials making that determination permissibly exercise policy choice . . . in determining that a vaccine product complies with the relevant safety standards." Id. at 545 (emphasis added). Because the record was unclear

---

[20] The case came up on a motion to dismiss, so the Court did not have the benefit of a fully developed factual record, as we have here.

on this point, the Court remanded for appropriate findings by the district court.[21]

The Berkovitz plaintiffs made another allegation: that DBS had approved the release of the particular lot of Orimune that contained Kevan Berkovitz's dose, and the agency violated federal policy in approving the release of that lot. The Court therefore considered whether the discretionary function exception applied to the release of a particular lot of the vaccine, as distinct from the issuance of a license to produce the drug. The regulations governing particular lots do not impose a duty on DBS to ensure that the vaccines comply with regulatory standards, nor do they require DBS to inspect every lot. Instead, "[t]he regulations generally allow [DBS] to determine the appropriate manner in which to regulate the release of vaccine lots, rather than mandating certain kinds of agency action." Id. at 546.

> Given this regulatory context, the discretionary function exception bars any claims that challenge [DBS's] formulation of policy as to the appropriate way in which to regulate the release of vaccine lots. Cf. [Varig Airlines, 467 U.S.] at 819-20 (holding that discretionary function exception barred claim challenging FAA's decision to establish a spot-checking program). In addition, if the policies and programs formulated by [DBS] allow room for implementing officials to make independent policy judgments, the discretionary function exception protects the acts taken by those officials in the exercise of this discretion. Cf. id. at 820 (holding that discretionary function exception barred claim

---

[21] In Irving II, we remanded to the district court for similar findings, as to whether Chase and Ritchie had any discretion to "permissibly exercise policy choice" in failing to inspect the die-out machine, in light of the factual circumstances of this case. It is those factual determinations, and the judgment for Irving resulting therefrom, that are before us now on appeal.

> that employees charged with executing the FAA's spot-checking program made negligent policy judgments respecting the proper inspection of airplanes). The discretionary function exception, however, does not apply if the acts complained of do not involve the permissible exercise of policy discretion. Thus, if [DBS' s] policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not involve the exercise of such judgment, the discretionary function exception does not bar a claim that the act was negligent or wrongful. Cf. Indian Towing v. United States, 350 U.S. at 69 (holding that a negligent failure to maintain a lighthouse in good working order subjected the Government to suit under the FTCA even though the initial decision to undertake and maintain lighthouse service was a discretionary policy judgment).

Berkovitz, 486 U.S. at 546-47 (emphasis added)

This passage again makes clear the Court's view that, in determining whether a particular (allegedly negligent) act is exempt from the FTCA under the discretionary function exemption, Berkovitz requires us to examine the particular government agent who "performed [the] given act," and to determine whether particular conduct is discretionary by looking at the "range of choice" the agency has delegated to the particular employee in performing the task in question.

The plaintiffs in Berkovitz had alleged that DBS had

> adopted a policy of testing all vaccine lots for compliance with safety standards and preventing the distribution to the public of any lots that fail to comply. [Plaintiffs] further allege[d] that notwithstanding this policy, which allegedly leaves no room for implementing officials to exercise independent policy judgment, employees of [DBS]

> knowingly approved the release of a lot that did not comply with safety standards. Thus, [plaintiffs'] complaint is directed at a governmental action that allegedly involved no policy discretion.

Id. at 547 (citation omitted; emphasis added).

The Berkovitz Court held that, "[i]f those allegations are correct - that is, if [DBS's] policy did not allow the official who took the challenged action to release a noncomplying lot on the basis of policy considerations - the discretionary function exception does not bar the claim." Id. It was therefore improper to dismiss plaintiffs' claim regarding the release of the particular lot of vaccines. See id. at 548.

The Berkovitz lot release allegations are analogous to Irving's claim that the "implementing officials" at OSHA (the line-level inspectors, Chase and Ritchie) were "le[ft] no room . . . to exercise independent policy judgment" because their supervisors mandated that they follow a particular inspection protocol.[22] Id. at 547. Thus, as in Berkovitz, we must parse the distinction between a regulatory agency's higher-level exercise of discretion in determining agency policy and procedure - which is exempt under § 2680(a) - and the implementation of that policy by the official who took the challenged action - which is exempt only if the employee himself is given his own policy-based discretion to "exercise independent policy judgment" in how to carry out his job. Id.

The staff employee's implementation conduct is not exempt from the FTCA if the employee has no choice but to comply with a higher-level mandate. And it makes no

---

[22] Because Berkovitz came up on a motion to dismiss, the Court remanded the case, giving plaintiffs the opportunity to make the required factual showing in support of their allegations. In this procedural respect, the present Irving appeal is not analogous. We previously ordered such a remand, and, as discussed infra at Part VI, here the plaintiff has already made the requisite factual showings and the district court has made findings that support her claims.

difference whether that higher-level mandate comes from an agency regulation that adopts a policy for all employees, saying they all must follow a particular procedure in all particular situations, or whether the higher-level mandate comes to the line-level employee from his or her immediate supervisor as the manner in which to conduct his inspection of this particular plant.[23] The question is whether the individual "employee's conduct can[] appropriately be the product of judgment or choice" on his part; if not, then "there is no discretion in the conduct for the discretionary function exception to protect." Berkovitz, at 536.

C

The Court's most recent FTCA discretionary function case, United States v. Gaubert, 499 U.S. 315 (1991), is fully consistent with this approach. The plaintiff in Gaubert challenged the allegedly negligent manner in which federal bank regulators had offered advice and made recommendations to a savings and loan institution. He argued that "the discretionary function exception protects only those acts of negligence which occur in the course of establishing broad policies, rather than individual acts of negligence which occur in the course of day-to-day activities." Id. at 334. The Court rejected the plaintiff's distinction between policy-making and operational decisions, reaffirming Berkovitz's focus on whether the actions of the particular government employee "involv[ed] the necessary element of choice" that was grounded in regulatory policy. Id. at 323.

The Court offered the example of a federal official negligently driving an automobile while on a mission connected with his official duties, concluding that "the

---

[23] It is true that the Court in Berkovitz did not discuss the example of a mandate from a supervisor. But, as discussed supra, it did offer a great variety of illustrative examples, all of which show that we have to look at whether the individual employee actually has policy-based discretion to take the actions which the plaintiff is challenging in the lawsuit.

[discretionary function] exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy." Id. at 325 n.7. The exception is no more applicable to Irving's case: even if the majority can somehow muster an argument that a compliance inspector has discretion to refuse to follow his supervisor's direct order about how thoroughly to inspect a particular plant, any such discretion "can hardly be said to be grounded in regulatory policy." Id.

In contrast, the regulators' actions that Gaubert challenged were within their range of policy-based discretion. They included replacing the bank's management; urging it to convert to federal charter; intervening with a state regulatory agency; advising the hiring of a financial consultant; advising when to place a subsidiary into bankruptcy; advising on litigation policy; and mediating salary disputes. These are not at all analogous to Chase and Ritchie's negligent failure to inspect every machine in the Somersworth Shoe plant, in contravention of the direct order of their supervisor to do so.

D

Unlike the majority here, other circuits have followed the Supreme Court's teachings in analyzing discretionary function cases. For example, in Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1031-32 (9th Cir. 1989), the Ninth Circuit held that a claim that the government negligently constructed a canal was not barred because the "contracting officer's on-site decisions" were not based on "policy judgments," and hence "were not of the nature and quality that Congress intended to shield from tort liability." In Phillips v. United States, 956 F.2d 1071 (11th Cir. 1992), the Eleventh Circuit held that the exception was not applicable to a claim that the Army Corps of Engineers failed to exercise due care in carrying out mandatory safety obligations. In Murdock v. Employer's Ins. of Wausau, 917 F.2d 1065 (8th Cir. 1990), the court held the exception did not preclude a

claim that the government failed to ensure that proper procedure was followed in conducting excavation work. And in Cope v. Scott, 45 F.3d 445, 449 (D.C. Cir. 1995), the Third Circuit held that the exception did not apply to the claim that the government had failed to post adequate warning signs of dangerous road conditions.

III

It is true that the majority pays lip service to the appropriate focus: "We recognize that, by its plain terms, the OSH Act confers discretion only upon the Secretary, not upon compliance officers - and it is the latter's conduct that concerns us." Maj. Op. at 18. But the majority then shifts its focus. It bases its analysis not on the scope of discretion actually delegated to the two inspectors whose conduct is challenged in the instant case, but rather on regulations[24] and manuals that generally grant OSHA compliance officers broad discretion in the conduct of their inspections. Id. at 18-19.

The majority overstates the significance of the OSH Act and the relevant guidelines. According to the majority, "the statute and applicable regulations clearly speak to the nature of the conduct" at issue in this case. But they do not. The statute does not unambiguously permit inspectors to perform incomplete inspections, nor does it clearly leave discretion to the individual inspectors to decide just how comprehensive inspections must be, regardless of direct instructions from their superior officers. Rather, the statute only confers jurisdiction on the Secretary to perform inspections, and says nothing at all about how comprehensive they must be.

---

[24] The majority notes that "the legislative rules governing the authority of compliance officers mimic the statute and grant these officials broad discretion over the scope, manner, and detail of general administrative inspections." Maj Op. at 19.

The majority finds it "[o]f particular importance" that "the regulations do not prescribe any specific regimen governing the scope or detail of general administrative inspections performed by compliance officers." Id. at 19. But neither do the regulations preclude all supervisors from exercising any independent authority in managing the agency's work force. Regulations setting forth OSHA's general enforcement authority vis-a-vis employers do not speak to the question of how the agency may organize its staff into a hierarchy of managers, various levels of supervisors, and line-level subordinate staff. As the Court stated in Gaubert in an analogous situation, there is "no prohibition against the use of supervisory mechanisms not specifically set forth in statute or regulation." 499 U.S. at 330. The majority cannot seriously read OSHA's general regulations, applicable agency-wide, to transform OSHA supervisors into automatons who must tell all subordinate inspectors nothing more than "go out and exercise your own broad discretion."

Thus, the regulations cannot be read to deprive a supervisor, in this case the area director, of all authority, in a particular set of circumstances, to issue a specific instruction mandating that a particular compliance officer take specific actions when inspecting a particular factory (in this case, instructions as to the degree of thoroughness of the inspection). Surely, a subordinate compliance officer cannot refuse such an instruction on the theory that supervisory direction would violate the broad discretion given to him or her in the regulations. A subordinate employee does not have the "discretion" to disregard a direct order from his supervisor merely because there is no regulation or other "established governmental policy" that specifically requires such action of all inspectors in all circumstances. In the present case, it is enough that one particular area director, Amirault, did prescribe certain limitations on compliance inspectors Chase and Ritchie, with respect to their inspections of the Somersworth Shoe factory.

The majority ignores Amirault's direct order because, it asserts, "'wall-to-wall' inspections are no more than the general administrative inspections described by the statute, regulations, and guidelines." Maj. Op. at 25 n.10. Whatever may be true of the ordinary case, the facts of this case are different and require a different result. It is true that the general language of the statute, regulations, and guidelines ordinarily permit inspectors to exercise "the same broad discretion enjoyed by the Secretary with respect to such inspections." Maj. Op. at 21. But in this case, area director Amirault ordered inspectors Chase and Ritchie to do more than merely conduct a general administrative inspection; he ordered them to "look at the entire plant." "As far as humanly possible, [Chase and Ritchie] were supposed to cover the work place" and "observe any place where the employee works," "look[ing] at every operation" and "observing and documenting any violative condition." These facts were found by the district court and its factual findings are supported by record evidence and are not clearly erroneous. See Part VI, infra.

Even the government recognizes that the district court's finding - that Chase and Ritchie were required, in their "particular inspections," to "inspect every operational machine in the plant" - was "limited to the specific factual circumstances it found existed during the time and area covered by Mr. Amirault's testimony." Gov't Br. to Panel at 4-5 n. 1. Indeed, such limitation is the reason why the government decided not to "appeal the court's finding regarding the application of the discretionary function exception to this case." Id.

The proper inquiry therefore becomes whether Chase and Ritchie in fact retained any policy-based discretion, in failing to carry out Amirault's specific order to perform a wall-to-wall inspection. The majority's sweeping discussion of overall OSHA discretion in handling its inspections utterly fails to address this inquiry, and it certainly contains no support for the kind of affirmative response that would justify

application of the discretionary function exception. On the contrary, it is clear from the facts as found by the district court that the answer to the proper question is "no," and the exception is inapplicable. If, as the district court found, inspectors Chase and Ritchie had no such discretion, see Part VI, infra, then they had "no rightful option" about what action to take, and therefore the discretionary function exception does not apply, Berkovitz, 486 U.S. at 536.

The majority cites Gaubert for the proposition that "informal agency rules and similar pronouncements may at times bind agency personnel for the purposes of discretionary function exception analysis." Maj. Op. at 22 (citing Gaubert, 499 U.S. at 324). This still focuses on generally applicable "pronouncements."

What the majority fails to recognize is that a supervisor's mandate to a subordinate agency official will "bind" the subordinate in the conduct of his official duties, every bit as much as "agency rules," formal or informal. Such a binding order will preclude the subordinate from exercising discretion to any extent other than that allowed within the supervisor's command. Thus, "for the purposes of discretionary function exception analysis," courts should consult such individualized constraints "in appropriate cases to determine whether a particular function is (or is not) discretionary." Maj. Op. at 22.

In sum, the majority fails to follow the Court's guidance on the most fundamental question. The majority focuses its analysis on the discretion that OSHA and its command-level employees enjoy to determine how it will enforce the Act, including how thoroughly to inspect any given factory. The majority fails to apply the Court's analysis which centers on the extent of discretion exercised by the particular agency employee whose actions are challenged by the plaintiff. This focus should prevail at both steps of the Berkovitz analysis.

Here, it is difficult to see any policy judgment in negligently carrying out a commanded inspection or in flouting a supervisor's direct order. But even if some such

discretion did exist, we still have to reach Berkovitz's step two, which asks whether such discretion was based in political, social, or economic policy, for Congress intended to "protect[] only governmental actions and decisions based on considerations of public policy." Gaubert, 499 U.S. at 323 (quoting Berkovitz, 486 U.S. at 537). And any discretion Chase and Ritchie might have enjoyed to negligently carry out a commanded inspection "can hardly be said to be grounded in regulatory policy." Id. at 325 n.7.

IV

In its attempt to apply the appropriate legal doctrine here, the majority opinion repeatedly distorts Irving's theory of the case,[25] characterizing it as alleging "that OSHA had a policy of exhaustively inspecting every machine," Maj. Op. at 28; "that OSHA had a strict policy of requiring inspectors to look in detail at every machine," id. at 31; "that all inspections ought to be painstakingly comprehensive," id. at 34; "expect[ing] [OSHA inspectors] to inspect every item in every plant," id.; and "zero tolerance for any kind of risk," id. at 34 n. 13.[26] The majority then bravely shoots down this straw man.

But it bears no relationship to Irving's theory of the case. The conduct that Irving challenges is Chase and Ritchie's failure to inspect every machine in the Somersworth Shoe

---

[25] This is essentially the flip side of its blurring the distinction between generally applicable rules granting discretion, on the one hand, and, on the other hand, the fact-specific question of whether Chase and Ritchie actually had any discretion in Irving's case. See Part II, supra.

[26] The majority writes: "Importantly, the Manual contains no specific prescription mandating OSHA inspectors to proceed item by item or to cover every nook and cranny of a facility during a general administrative inspection." Maj. Op. at 24-25. Of course the Manual contains no such prescription. It is not a general requirement, applicable to all inspections at all times. But Irving simply alleges that the area director decided to order a wall-to-wall inspection in this case, at this plant, at this time.

factory after receiving binding instructions from their supervisor to do so. She does not argue that OSHA inspectors must "inspect every item in every plant." Maj. Op. at 33-34. With respect only to the Somersworth Shoe plant, Amirault had already weighed the competing policy interests and concluded that this particular inspection must be wall-to-wall, with every machine inspected and every violation documented. Thus, the two inspectors who actually visited the Somersworth plant had no choice about how extensively to inspect; there was no room for them to exercise judgment or consider agency policy concerns when it came to determining whether to skip any machines; they had no discretion in the matter at all, whether driven by policy or otherwise. They had orders and they were to follow them. The fact that OSHA's upper management had a great deal of discretion to choose various methods of enforcement in deciding which plants around the country to inspect, whether to do spot checks for some and wall-to-wall inspections for others, is quite irrelevant from the point of view of the "Government agent[s]" whose "acts" the Court told us to scrutinize in cases like this. Gaubert, 499 U.S. at 324; see Berkovitz, 486 U.S. at 536, 547. In this rare case, those higher officials had already chosen to exercise their discretion in a particular way, and their actions in so deciding are not being challenged here.

The majority makes much of the fact that OSHA's resources are limited and that OSHA must be permitted discretion to choose how best to allocate such resources. But Irving does not challenge OSHA's allocation of resources any more than she challenges OSHA's enforcement policy in general or the decision to inspect one site rather than another. Rather, she challenges only the thoroughness with which the inspection was carried out after the decision had been made to inspect this particular site in a particular way, i.e., after the inspectors were specifically instructed to conduct wall-to-wall inspections. The Eleventh Circuit's admonition is also applicable to OSHA (and virtually all federal agencies):

> "Because resources are limited, it is axiomatic that discretion must be used in allocating available resources. . . . Nevertheless, this does not mean that a federal employee's every choice is a policy judgment shielded from liability through the operation of the discretionary function exception."

Phillips, 956 F.2d at 1075.

The majority blurs the distinction, implicitly lumping together Irving's claim with a theoretical challenge to high-level agency resource-allocation decisions. This fundamental failure carefully to parse her claim is contrary to the Supreme Court's own detailed practice, as evidenced by Gaubert and Berkovitz, and it infects the majority's entire analysis. See, e.g., Murdock, 917 F.2d at 1073 (carefully distinguishing between claims, barring claim concerning decision as to what procedure should be used to conduct excavation but not precluding claim as to government's "failure to ensure that procedure was followed").

Moreover, as noted supra, while the Supreme Court has rejected a rigid dichotomy between high-level and operational decisions, see Gaubert, 499 U.S. at 326, the relative place of the individual within the hierarchy does shed some light on the question of whether that "acting employee's" conduct is of the kind that Congress would have shielded. See id. at 335 (Scalia, J., concurring); Coumou v. United States, 114 F.3d 64, 65 (5th Cir. 1997) (recognizing some difference "between decisions at a planning level, or decisions that exercise policy judgment, and decisions at a[n] operational level, or decisions that are merely incident to carrying out a government policy."). In particular, here, a line-level inspector is not the kind of OSHA official who normally makes policy judgments as to how the agency should deploy its scarce resources. Nor is there any evidence in the record or other reason to believe that Chase or Ritchie were in fact authorized to exercise such discretion in connection with Somersworth Shoe.

Irving's claim, properly construed, is that, once inspectors have been ordered to perform a wall-to-wall inspection, they must do so with due care. Her claim does not implicate OSHA's resource allocation discretion at all. Not only has the government failed to identify a specific policy empowering on-site inspectors to determine how thoroughly to conduct inspections, it has utterly failed to provide any support for its naked assertion that such a decision is actually "grounded" in any policy decisions. This case simply does not involve second-guessing broad policy choices.

V

A number of other legal errors flaw the majority opinion.

A

The majority distorts Supreme Court precedent in the very framing of its analysis. It states: "Under the jurisprudence of the FTCA, a function is non-discretionary only when a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.' Gaubert, 499 U.S. at 322 (quoting Berkovitz, 486 U.S. at 536)." Maj. Op. at 19-20 (emphasis added). There is no basis in law for that position.

The word "only" does not appear in either Gaubert or Berkovitz in connection with the quoted passage. The Supreme Court has never required that a plaintiff show that the acting agent is a bureaucratic automaton. Rather, it has repeatedly made clear that "[t]he so-called discretionary function exception . . . does not protect all governmental activities involving an element of choice." Gaubert, 499 U.S. at 335 (Scalia, J., concurring) (citing Berkovitz, 486 U.S. at 536-37). In the passage quoted by the majority, the Court was merely explaining, by way of illustration, that the government could not satisfy "the requirement of judgment or choice" if a specific prescription existed in the statute, regulation or policy. But the Court has never said that, absent such a clear statement, embedded in formal law, a particular function is

therefore purely discretionary. Indeed, in Gaubert, the Court essentially said the contrary: "[T]here was no prohibition against the use of supervisory mechanisms not specifically set forth in statute or regulation." 499 U.S. at 330; see also id. at 326 ("[T]he distinction in Dalehite [v. United States, 346 U.S. 15 (1953)] [between decisions made at a planning rather than operational level] was merely description of the level at which the challenged conduct occurred. There was no suggestion that decisions made at an operational level could not also be based on policy.").

Moreover, the Court plainly has never raised the threshold on the first prong so high, as the majority does today, as to make it virtually impossible to satisfy.[27] To require a plaintiff to show that the "acting employee" has no discretion at all is tantamount to requiring the plaintiff to disprove the government's entitlement to the exception, and expands the discretionary function exception so much that it swallows the rule of waiver of sovereign immunity. But these exceptions should be read narrowly. As the Court stated in Kosak v. United States, 465 U.S. 848, 854 n. 9 (1984):

> Though . . . the exceptions to the Tort Claims Act should not be read in a way that would "nullif[y them] through judicial interpretation," [citation omitted], unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute. See United States v. Yellow Cab Co., 340 U.S. 543, 548 n. 5 (1951); cf. Block v. Neal, 460 U.S. 289, 298 (1983) ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.") [internal quotation marks omitted]. We think that the proper objective

---

[27] The majority's position would require a plaintiff to demonstrate that no possible discretion could be exercised by the acting government official, in order to satisfy the first of the two Berkovitz prongs.

> of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to identify "those circumstances which are within the words and reason of the exception" -- no less and no more. See Dalehite v. United States, 346 U.S. 15, 31 (1953).

B.

The second prong of Berkovitz's analysis of the discretionary function exception - whether the challenged inaction "is of the kind that the . . . exception was designed to shield," i.e., grounded in policy - is critical, for the exception, at its heart, seeks to prevent second-guessing of governmental policy decisions. True, "there is a presumption that 'the agent's acts are grounded in policy,'" where an agency official is found to be exercising discretion. Maj. Op. at 31-32 (quoting Gaubert, 499 U.S. at 324). But the majority fails to recognize that the presumption is rebuttable. It may be overcome by evidence such as Irving presented here, demonstrating that these particular officials were not balancing competing policy concerns when they failed to inspect the die-out machine during their inspection of the Somersworth Shoe factory, after being instructed by their supervisor to inspect every machine.[28]

The majority erroneously treats the presumption as a strong one, such that "the United States has no burden of production; it may rest, as it did here, on the Gaubert

---

[28] In addition, as Justice Scalia has explained, "[o]rdinarily, an employee working at the operational level is not responsible for policy decisions, even though policy considerations may be highly relevant to his actions." Gaubert, 499 U.S. at 335 (Scalia, J., concurring). It makes sense to consider whether the acting employee's decision was one that "ought to be informed by considerations of . . . policy and is made by an officer whose official responsibilities include assessment of those considerations." Id. Hence, it is less likely that tort suits challenging the actions of low-level employees can be said to result in a second-guessing of important public policy decisions, which is what the exception is intended to prohibit.

presumption." Maj. Op. at 32. The result of this front-loaded approach is that the second prong will almost always be satisfied once the first has been met. This approach is contrary to Berkovitz and Gaubert, and also to the weight of authority in other circuits that have properly acknowledged the overriding purpose of the exception: to protect against impermissible second-guessing of express policy judgments.[29]

It is admittedly difficult to determine whether a decision or task is based on political, social or economic policy, for "nearly every government action is, at least to some extent, subject to 'policy analysis.'" Cope, 45 F.3d at 448. The majority's approach permits decisions by low-level employees involving the faintest hint of choice to fall within the exception. But as courts have repeatedly warned, such a front-loaded approach "would not only eviscerate the second step of the analysis set out in Berkovitz and Gaubert, but it would allow the exception to swallow the FTCA's sweeping waiver of sovereign immunity." Cope, 45 F.3d at 449 (holding that exception did not apply to claim that government failed to post adequate warning signs of dangerous road conditions; see also Duke v. Department of Agric., 131 F.3d 1407, 1411 (10th Cir. 1997) (agreeing with D.C. Circuit that applying exception to governmental decision

---

[29] Unlike today's majority, those circuits have kept the main goal of the exception in focus by giving meaning to the second prong. See Cope, 45 F.3d at 449 ("nature" of exempt decision must be "fraught with . . . public policy considerations."); see, e.g., Gotha v. United States, 115 F.3d 176, 181 (3d Cir. 1997) (rejecting applicability of exception where claim involved Navy's failure to provide safeguards to pathway); Andrulonis v. United States, 952 F.2d 652, 654 (2d Cir. 1991) ("Policy considerations . . . remain the touchstone for determining whether the discretionary function exception applies."); Routh v. United States, 941 F.2d 853, 857 (9th Cir. 1991) (contracting officer's on-site decisions not so rooted in policy as to bar claim alleging failure to use proper safety equipment); Kennewick Irrigation Dist., 880 F.2d at 1031-32; Phillips, 956 F.2d at 1075.

involving a "hint of policy concern" eviscerates the second prong of Berkovitz).[30]

A somewhat analogous situation may be seen in the cases involving a failure to warn of a danger to health or safety. In such situations, the actor who failed to warn is similar to inspectors Chase and Ritchie here: if the acting employee had warned of the danger, the plaintiff would not have been injured. And, similarly, the failure to warn was not based on balancing competing policy interests. Some courts have consistently held that "a failure to warn involves considerations of safety, not public policy" and that except for the rare case where failure to warn implicates "broad, policy-making activities" the discretionary function exception is inapplicable in failure to warn cases. Faber v. United States, 56 F.3d 1122, 1125 (9th Cir. 1995); see also Boyd v. United States, 881 F.2d 895, 898 (10th Cir. 1989) (failure to warn swimmers of dangerous conditions "does not implicate any social, economic, or social policy judgments with which the discretionary function exception properly is concerned."); Andrulonis v. United States, 952 F.2d 652 (2d Cir. 1991) (highranking official's alleged failure to warn of hazards associated with rabies vaccine not barred by exception).

C.

The majority's analysis seems to reinstate the "regulatory function exception" which the government urged upon the Court in Berkovitz but which the Court explicitly rejected. See Berkovitz, 486 U.S. at 538-39. Without any basis in the Act, the government had proposed that the Court transform the discretionary function exception into a

---

[30] Courts have also held the government to fail the second prong on evidentiary grounds, where the record does not support its contention that the challenged decision was "grounded in policy." See, e.g., In re The Glacier Bay, 71 F.3d at 1450 ("When the record does not show that a decision is based on . . . policy considerations, the exception does not apply.")

"regulatory function exception" that would apply § 2680(a) to "preclude[] [government] liability for any and all acts arising out of the regulatory programs of federal agencies." Id. at 538. The government had argued that regulatory programs by their nature entail agency discretion at the highest levels to weigh various competing policy interests. Based on the statute's plain language and the legislative history, the Court "put the Government's argument to rest," id. at 539, concluding that "Congress intended the discretionary function exception to apply to the discretionary acts of regulators, rather than to all regulatory acts," id. at 539 n. 4.

The majority's decision today resurrects the government's discredited "regulatory function" theory. Because the larger agency (OSHA) has broad discretion over its enforcement authority (as all regulatory agencies clearly will), the majority's approach would exempt from tort liability virtually all actions taken by employees of regulatory agencies, without looking at whether the acting employee, whose conduct is the basis of the suit, actually had "no rightful option but to adhere to [a] directive" from his supervisor. Berkovitz, 486 U.S. at 536.

VI

In addition to its erroneous interpretation of Supreme Court precedent, the majority inexplicably fails to adhere to the well-established "clearly erroneous" standard of review for district court findings of fact. See Fed. R. Civ. P. 52(a); Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985).

The district court found the following facts: (i) in 1975 and 1978, the OSHA compliance officers each had been directed to perform a "wall-to-wall" safety inspection of the Somersworth plant; (ii) although the OSH Act and OSHA regulations leave many decisions regarding the conduct of workplace inspections to the discretion of the area director and compliance officers, the scope of the inspections of the Somersworth plant that the compliance officers were instructed to perform in 1975 and 1978 "was dictated by less

formal, but no less binding, OSHA policy," requiring the officers to "inspect every operational machine and work station in the plant," and to record every violation of OSHA safety standards that they observed - be they de minimis, non-serious, or serious - if there was potential employee exposure to the violative condition; (iii) the die-out motor drive shaft was not guarded by location at the time of the accident; (iv) at the time of the accident, the die-out machine was in materially the same condition, and was at or near the place it had been located during the 1975 and 1978 inspections, and, therefore, the drive shaft had not been guarded by location at the time of these inspections; (v) the dieout machine was in near-continuous operation during the relevant time period, and was in operation during both inspections; (vi) operation of the die-out machine while the drive shaft remained unguarded was in flagrant violation of OSHA safety standards; (vii) during the 1975 and 1978 inspections, the compliance officers failed to document, and OSHA failed to cite, the violative condition of the drive shaft; (viii) had the compliance officers actually inspected the bench assembly, they would have noticed and documented the violative condition of the drive shaft. 942 F. Supp. at 1492-1502.[31]

---

[31] Four OSHA employees testified at the 1985 bench trial: Richard Amirault, the area director at the time of the 1975 and 1978 inspections; William Chase, the compliance officer who conducted the 1975 inspection; John M. Ritchie, the compliance officer who conducted the 1978 inspection; and Paul O'Connell, the senior safety engineer who conducted the 1979 post-accident inspection.

Amirault testified that OSHA compliance officers were "charged to look at the entire plant"; that, in conducting a wall-to-wall inspection, the compliance officers "were supposed to make a complete walk-through and identify and document any hazardous conditions that they would see"; and that," [a]s far as humanly possible, [the inspectors] were supposed to cover the work place" and "observe any place where the employee works." Although Amirault repeatedly testified that the compliance officers were required only to report the violations they observed -- e.g., "If we could spot the unsafe condition, it should be cited." -- he also

The district court concluded from the evidence that the record would not support a finding that OSHA compliance officers Chase and Ritchie - both of whom the court found to be experienced workplace safety inspectors who took their jobs seriously - were so utterly incompetent as to have inspected the bench assembly but failed to notice the unguarded condition of the drive shaft and to recognize it as a violation of OSHA standards. Instead, the preponderance of the evidence "decidedly supports the conclusion that both Chase and Ritchie would have recognized that the bench assembly violated OSHA safety standards requiring the guarding of power transmissions if they had, in fact, inspected it," and that the only realistic explanation for their failure to notice and document the unguarded drive shaft was that neither officer actually inspected the bench assembly during his inspection of the Somersworth plant. 942 F. Supp. at 1497 (emphasis added). The district court thus determined that the

---

testified that the inspectors "should look at every operation" and "should be observing and documenting any violative condition."

Chase conceded that it would have been carelessness for a compliance officer to have missed the violative condition of the drive shaft. He testified that, in 1975, "I made a complete inspection of the facility as I am required to do and made notes, et cetera, of everything that I observed." While acknowledging that inspectors occasionally fail to notice violative conditions, Chase testified that, if the bench assembly were in the same location at the time of his 1975 inspection as it was at the time of the accident, he could not have failed to recognize the condition of the drive shaft as a serious violation of OSHA standards. He stated, "I deny anybody to say they haven't [made a mistake] but not something that obvious." And, "I wouldn't miss something like that; it's too obvious, positively." He also stated, "[T]here's no way I'd have missed that setting right out in the wide open on a main aisle in . . . the stock fitting room. No way." According to Chase, no compliance officer who looked at the bench assembly would have failed to recognize the unguarded drive shaft as a serious violation, even on the officer's worst day. Amirault and O'Connell concurred in Chase's conclusion that the violation was both obvious and serious, with Amirault conceding that a prudent inspector who saw the bench assembly depicted in O'Connell's post-accident photographs should have noticed the unguarded condition of the drive shaft and recognized it as a violation of OSHA safety standards.

challenged conduct, and the basis for Irving's state-law cause of action and FTCA claim, was the failure of the compliance officers to inspect every operational machine in the Somersworth plant in 1975 and 1978, as they were required to do by mandatory OSHA policy, and their negligent performance of their task. Id. "[T]hey were under a mandatory duty to inspect every operational machine and failed to do so." Id. at 1502.

The majority never analyzes the district court's findings of fact under the proper standard of review: whether they were clearly erroneous. See Fed. R. Civ. P. 52(a). In particular, the majority fails to accord appropriate deference to the district court's findings, as the "clearly erroneous" standard requires. See Anderson, 470 U.S. at 573-74 (explaining that the same deference is required to district court's "inferences drawn from other facts"); Johnson v. Watts Regulator Co., 63 F.3d 1129, 1138 (lst Cir. 1995) ("[A]n appellate court must refrain from any temptation to retry the factual issues anew.").[32]

Instead, the majority examines the evidence for itself and second-guesses the district court's findings, making its own findings of fact. That would be fine, if this court were the trial

---

[32] The majority explains this failure by stating that "the lower court's crucial findings were grounded in an erroneous legal framework," so "an appellate court should not defer to [the] trial court's factfinding." Maj. Op. at 28 n.11. It is true that appellate courts should not defer to a trial court's factual findings which actually result from an erroneous application of law to the facts of the case. But that is not what happened here. The district court here found historical facts, e.g., facts that describe what Amirault ordered Chase and Ritchie to do, and what the inspectors in fact did (or did not do) in response to that order. These historical facts have nothing to do with the question whether the district court later examined those facts through an incorrect legal lens. See Reich v John Alden Life Ins. Co , 126 F.3d 1, 7 (lst Cir. 1997); State Police Ass'n of Mass. v. Commissioner of Internal Revenue, 125 F.3d 1, 5 (lst Cir. 1997). As to such historical facts, appellate courts must defer to the trial court's factual findings unless they are clearly erroneous. See Anderson, 470 U S. at 573-74; Johnson, 63 F.3d at 1138.

court. But the district court heard the evidence and reached a contrary set of factual determinations. This court has no basis for disturbing those findings. Arthur D. Little, Inc. v. Dooyang Corp., 147 F.3d 47, 54 (lst Cir. 1998) (Where the "district court's findings of fact are not clearly erroneous," the appellate court "will not disturb them.").

The district court's findings are plainly supported by the record in this case; at the very least, they are not so lacking in support as to be clearly erroneous. Nothing in the record indicates that Amirault ordered inspections in 1975 and 1978 that were anything other than wall-to-wall inspections, or that the OSHA compliance officers were at liberty to choose to conduct a spot-check inspection of only some, not all, machines or areas within the plant In all events, the government does not now dispute that the compliance officers in 1975 and 1978 were obliged to conduct wall-to-wall safety inspections; indeed, the government's attorney conceded at oral argument before the district court that "[i]f there's a requirement to look at every machine and he does not look at every machine, then I would agree that that's a violation of a mandatory regulation." 942 F. Supp. at 1499 n.19.

Moreover, the means by which the majority carries out its own fact-finding mischaracterizes the trial testimony. An example appears in the majority opinion at 31. The majority quotes a series of questions and answers and then summarizes them as follows: "Read naturally, this passage indicates that general administrative inspections constitute nothing more than 'walk throughs' that involve random spot checks." This summary is not at all accurate. The "natural" reading of Amirault's testimony is not that the inspector, once inside the plant, would "spot check" only some machines; rather, OSHA's "random way of just doing spot checks on an entire plant without advance notice," maj. op. at 30, more likely meant that OSHA chose at random which plant to inspect. Regarding the Somersworth inspections in particular, Amirault testified that, once inside the plant, the inspector was to conduct "a wall-to-wall inspection," spending

"whatever time was necessary to inspect the entire plant for safety hazards," id. at 31 (emphasis added), "machine by machine by machine," Irving, 942 F. Supp. at 1491 n.8. If the majority's "spot-check" finding of fact were made by a district court, an appellate tribunal would be compelled to strike it as clearly erroneous. The district court's findings to the contrary were plainly correct, and surely pass muster under the clearly erroneous standard of review.[33]

In discussing the ordinary procedures for conducting inspections, the majority notes that "OSHA compliance officers are expected to study the layout of the facility they are about to investigate, to review its health and safety records, and to interview employer and employee representatives during the inspection about working conditions. One might expect that as a result of such study, OSHA inspectors will make daily judgments about what risks and safety issues most urgently require their attention." Maj. Op. at 33. But again, the question is not what the majority of this court "expects" might occur during an ordinary OSHA inspection, but what actually appears in the record of this case. As the district court found, here, OSHA, through its area director, in fact undertook a wall-to-wall inspection of the Somersworth Shoe plant. Chase and Ritchie were ordered to carry out that undertaking, not to decide for themselves "what risks and safety issues most urgently require their attention." Whatever "daily judgments" they might, in other circumstances, have been authorized to make about such issues were inapplicable here. Chase and Ritchie had no choice in these particular inspections but to comply with the mandate from their superior.

---

[33] Even the majority's legal analysis is based on an erroneous factual predicate: that the government "has reserved to its own officials the decision about whether or not to act." Maj. Op. at 34-35. While OSHA as a whole retains such discretion, and has delegated it down the ranks at least as far as the area director, the latter refused to delegate such discretion to the line inspectors whose conduct the plaintiff has challenged.

CONCLUSION

The majority decides today that the government is immune from suit for the inspectors' negligence, based on the discretionary function exception to the Federal Tort Claims Act (FTCA). 28 U.S.C. § 2680(a). It rewards the agency when it undertakes to conduct a comprehensive safety inspection and then does so carelessly. And when the record is devoid of any evidence to suggest why incomplete "wall-to-wall" inspections or shoddy inspections could possibly be grounded in policy, the majority creates its justifications out of whole cloth. Such a decision violates the letter and spirit of the FTCA and flies in the face of controlling Supreme Court precedent on the subject.

I have great regard for my colleagues on this court. But however able they may be, they do not have the authority to refuse to follow a binding precedent from the Supreme Court of the United States. The Court's early treatment of the discretionary function exception may have been inconsistent or unclear as to how to apply the exception. But the decision in Berkovitz clarified the analysis courts must employ in such cases. Berkovitz also harmonized prior precedents and, as I have shown, Gaubert is likewise in harmony with the Berkovitz approach.

Unfortunately, the majority today totally misapplies the Court's rulings, indeed eschewing any analysis of Berkovitz whatsoever. The majority instead states its own priorities: "Even if [a government] decision may seem wrong in retrospect, or if its implementation is negligent, such decisionmaking[34] by its nature typically requires a balancing of interests (e.g., how to deploy scarce government resources in the accomplishment of worthwhile - but expensive - public

---

[34] Irving does not, of course, challenge OSHA's decision-making. She applauds the decision to pursue a wall-to-wall inspection of Somersworth Shoe. She challenges only the negligent implementation, by subordinate employees, of the agency's decision.

needs). Congress reasonably struck this balance by requiring that, ordinarily, liability will not inhere absent an authoritative decision that a specific act should become a governmental responsibility." Maj. Op. at 35.

This does not state the applicable law according to the Supreme Court. Nowhere does the Court require "an authoritative decision that a specific act should become a governmental responsibility" before an injured party may sue in tort. On the contrary, the FTCA broadly waives sovereign immunity unless the government establishes that the employee performing the challenged act - not his supervisor - acted within authorized discretion that was based in policy. If other members of this court are unhappy with the FTCA as it has been authoritatively interpreted by the Supreme Court, they cannot simply ignore the Court's interpretation of Congressional intent. Unless Congress amends the statute or the Court modifies its construction, this court must faithfully apply the Court's teachings. See Wessmann v. Gittens, __ F.3d __, __, 1998 WL 792148, at *21 (lst Cir. 1998) ("[U]nless and until the Justices reconfigure their present doctrine, it is the job of judges in courts such as this to respect the letter and spirit of the Supreme Court's pronouncements.").

The majority's mischaracterization of plaintiff's position further undermines its conclusion. In short, the majority does today what the Supreme Court has specifically warned against: it has acted "as a self-constituted guardian of the Treasury import[ing] immunity back into a statute designed to limit it." Indian Towing, 350 U.S. at 69.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUN 12 1998

No. 96-2368

GAIL MERCHANT IRVING,
Plaintiff, Appellee

v.

UNITED STATES OF AMERICA,
Defendant, Appellant.

No. 96-2369

GAIL MERCHANT IRVING,
Plaintiff, Cross-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant, Cross-Appellee.

Before

TORRUELLA, Chief Judge
SELYA, BOUDIN, STAHL, and LYNCH,
Circuit Judges.

ORDER OF COURT

Entered: June 8, 1998

A majority of the judges of this court in active service have voted sua sponte to review the panel decision in this matter en banc. The panel opinions (majority and dissenting) are therefore withdrawn.

The parties shall file simultaneous supplemental briefs within thirty days of the date of this order, not to exceed twenty-five pages per side. The issues for en banc review include both the applicability of the Federal Tort Claims Act and its discretionary function exception, and the question of whether New Hampshire law (particularly that state's Good Samaritan doctrine) would hold a private actor liable under the circumstances of this case.

The en banc court reserves, pending its receipt and consideration of the supplemental briefs, any determination as to whether further oral argument will aid the decisional process. If the court answers that question affirmatively, oral argument will be scheduled during the court's September 1998 sitting. If the court answers that question negatively, the court will decide the case on the record (including the supplemental briefs).

By The Court

PHOEBE D. MORSE, CLERK

By: JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Messr. Cox and Ms. Pyles]

United States Court of Appeals

For the First Circuit

No. 96-2368

GAIL MERCHANT IRVING,

Plaintiff, Appellee,

v.

UNITED STATES OF AMERICA,

Defendant, Appellant.

No. 96-2369

GAIL MERCHANT IRVING,

Plaintiff, Cross-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant, Cross-Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

[Hon. Steven J. McAuliffe, U.S. District Judge]

Before

Selya, Circuit Judge,

Bownes, Senior Circuit Judge,

and Stahl, Circuit Judge.

Phyllis J. Pyles, Attorney, with whom Frank W. Hunger, Assistant Attorney General, Paul M. Gagnon, United States Attorney, and Jeffrey Axelrad, Attorney, were on brief for appellant United States of America.

Paul R. Cox and Matthew B. Cox with whom Burns, Bryant, Hinchey, Cox & Rockefeller, P.A. were on brief for appellee Gail Merchant Irving.

April 8, 1998

BOWNES, Senior Circuit Judge. On October 10, 1979, plaintiff-appellee Gail Merchant Irving was grievously injured in a gruesome workplace accident at the Somersworth Shoe Company manufacturing plant in Somersworth, New Hampshire. On October 7, 1981, having exhausted her administrative remedies, see 28 U.S.C. § 2675(a), Irving brought suit against the United States in the federal district court pursuant to the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671-80 ("FTCA"). Subject to certain enumerated exceptions, see 28 U.S.C. § 2680, the FTCA waives sovereign immunity and subjects the United States to liability for the tortious conduct of government employees, acting within the scope of their employment, under circumstances in which the United States, if a private person, would be liable to the claimant under the law of the state where the challenged conduct occurred, see 28 U.S.C. §§ 1346(b), 2674.

Irving's FTCA claim was based upon alleged negligence in the performance of two safety inspections of the Somersworth plant, conducted in 1975 and 1978 by two different compliance officers of the Occupational Safety and Health Administration ("OSHA"). The state-law cause of action underlying Irving's FTCA claim was based upon the Good Samaritan doctrine, see generally Restatement (Second) of Torts ("Restatement") §§ 323, 324A, as it has been interpreted and applied under New Hampshire law, see, e.g., Corson v. Liberty Mut. Ins. Co., 265 A.2d 315 (N.H. 1970).

Between 1981 and 1995, the district court thrice ruled in favor of the government, and this court thrice vacated the district court's judgment and remanded the case for further proceedings with instructions.[1] On remand from the third and

---

[1] Previous decisions rendered in this case include, in chronological order: Irving v. United States, 532 F. Supp. 840 (D.N.H. 1982) (denying government's motion to dismiss); Irving v. United States, No. Civ. 81-501-SD (D.N.H. March 22, 1983) (denying government's renewed motion to dismiss); Irving v. United States, No. Civ. 81-501-SD (D.N.H. August 8, 1984) (denying government's renewed motion to dismiss on the

immediately prior appeal, Irving v. United States, 49 F.3d 830 (1st Cir. 1995), Irving prevailed on the merits of her claim in de novo proceedings before a different district judge, and the court awarded her a million dollars in damages. Irving v. United States, 942 F. Supp. 1483 (D.N.H. 1996). Although the district judge found that Irving had proven damages of approximately 1.23 million dollars, he refused to award an amount greater than the one million dollars stated in the ad damnum clause of Irving's 1980 administrative claim, citing 28 U.S.C. §§ 2674, 2675(b), and Library of Congress v. Shaw, 478 U.S. 310 (1986).

The government now appeals from the district court's entry of judgment for Irving, and Irving cross-appeals from the district court's decision to limit her damages to the amount requested in her administrative claim. We affirm.

I.

A.

On the afternoon of October 10, 1979, Gail Merchant Irving, who was then 21 years old, was severely injured when she bent over to retrieve a glove from the floor in the aisle next to her workbench, and her hair became entangled in the

---

basis of United States v. Varig Airlines, 467 U.S. 797 (1984)); Irving v. United States, No. Civ. 81-501-SD (D.N.H. January 27, 1988) (reversing prior rulings and dismissing claim for lack of subject matter jurisdiction, citing intervening First Circuit authority); Irving v. United States, 867 F.2d 606 (lst Cir. 1988) (unpublished order vacating judgment); Irving v. United States, No. Civ. 81-501-SD (D.N.H. February 14, 1989) (dismissing claim for lack of subject matter jurisdiction on the basis of Galvin v. OSHA, 860 F.2d 181 (5th Cir. 1988)); Irving v. United States, 909 F.2d 598 (lst Cir. 1990) (vacating judgment); Irving v. United States, No. Civ. 81-501-SD, 1994 WL 287750 (D.N.H. June 23, 1994) (judgment on the merits); Irving v. United States, No. Civ. 81-501-SD, 1994 WL 392614 (D.N.H. July 28, 1994) (denying reconsideration of judgment); Irving v. United States, 49 F.3d 830 (lst Cir. 1995) (vacating judgment); Irving v. United States, 942 F. Supp. 1483 (D.N.H. 1996) (judgment on the merits from which this appeal is taken).

unguarded rotating drive shaft of a nearby machine. At the time of the accident, Irving was working at a workbench assembly, located on a main aisle in the stock fitting room of the Somersworth plant, operating a "marker" machine used to stamp the inner soles of shoes. Although she had worked on and off in different shoe factories, including Somersworth, for the previous four years, Irving had been steadily employed at Somersworth only since mid September of 1979.

A "die-out" machine was attached to the east end of the same workbench to which the marker machine was attached. Unlike the manual marker machine, the die-out machine was powered by an electric motor, which was located beneath the workbench and connected to the die-out machine by means of a horizontal drive shaft running underneath the bench. When the die-out motor was running, the drive shaft rotated at a high rate of speed, creating a vacuum. Although an OSHA regulation required that the rotating drive shaft be guarded, the drive shaft on the die-out machine was unguarded.

Behind the workbench was a "die rack," which stored dies, patterns, and ink ribbons for use on the die-out and marker machines. Marker-machine operators were required to change the ink ribbon or the pattern on the marker machine as needed. In order to retrieve these items from the die rack, it was necessary for the operator to enter the 2.5-3-foot-wide aisle between the rear of the workbench and the die rack. This same aisle also provided the only means of reaching the power switch for the motor that ran the die-out machine.

On the day of the accident, Irving needed to change the pattern and the ink ribbon on the marker machine. After picking up a pair of the latex gloves worn by operators when changing the ribbon so as to protect their hands from the ink, Irving walked around to the back of the bench assembly to the die rack in order to retrieve a new pattern and ribbon. As she stood in the aisle between the workbench and the die rack, Irving dropped one of the gloves on the floor. When she reached down to retrieve the glove, her hair was drawn into the unguarded drive shaft by the vacuum created by its

high-speed rotation, and became entangled in the shaft. As a result, Irving suffered grievous injuries. The exposed drive shaft tore her scalp from her skull, and fractured and dislocated her second cervical vertebra. She suffered cardiac and respiratory arrest, and, for a time, she was paralyzed from the neck down and could not speak. Although her condition has improved through years of physical therapy, Irving is left with permanent and severe neurological damage, which is unlikely to abate during her lifetime.

In 1975 and 1978, OSHA compliance officers, acting pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("OSH Act"), inspected the Somersworth plant for the purpose of ensuring Somersworth's compliance with OSHA safety standards. Although the compliance officers documented a number of violations of OSHA safety standards (for which citations and abatement orders were subsequently issued), and although the unguarded drive shaft was undisputedly a flagrant and serious violation of an OSHA safety regulation, in neither inspection was the drive shaft identified and documented by the officers, or cited by OSHA as violating that regulation. [2]

Six days after the accident, before any material changes were made to the marker/die-out bench assembly, OSHA Senior Safety Engineer Paul O'Connell conducted a post-accident inspection of the bench assembly, and found it to be in violation of three separate but related OSHA safety regulations. O'Connell found that the die out motor drive

---

[2] In 1975, OSHA Compliance Officer William Chase recorded 39 violations (four of them for unguarded power transmission drive shafting) of nine OSHA safety standards. In 1978, OSHA Compliance Officer John M. Ritchie recorded eleven violations (three of them for unguarded power transmission belts) of eight OSHA standards, and reported that Somersworth had inadequate safety training and no safety staff. The district court found that Somersworth did, in fact, timely abate all violations cited as a result of the 1975 and 1978 inspections, and, after Irving's accident, guarded the die-out motor drive shaft within the prescribed abatement period. 942 F. Supp. at 1507-08 & n. 31.

shaft was completely unguarded, in violation of 29 C.F.R §1910.219(c) (2) (ii) (1997),[3] which provides that "[s]hafting under bench machines shall be enclosed by a stationary casing, or by a trough at sides and top or sides and bottom, as location requires." O'Connell classified this violation as "serious" -- meaning that there was "a substantial probability that death or serious physical harm could result from [the] condition," 29 U.S.C. § 666(k) -- and gave the violation a "severity value" of eight, the highest severity value used by OSHA at the time. O'Connell also found two other violations of OSHA safety standards -- the pulley and drive belt on the die-out machine's electric motor were also unguarded, in violation of 29 C.F.R. §§ 1910.219(d)(1) and (e)(3)(i) -- which he also classified as "serious" violations. On October 23, 1979, OSHA fined Somersworth a total of $1,800 (later reduced to $1,400) for the three violations, and ordered the company to abate the violations by November 10, 1979.

B.

In her complaint, Irving alleged that she was injured by the die-out motor drive shaft as a direct and proximate result of the negligence of the OSHA compliance officers who performed the 1975 and 1978 inspections, in failing to identify and document the unguarded condition of the drive shaft. Irving's theory of liability is that, had the compliance officers documented this condition during either of the two inspections, OSHA would have given notice of the condition to Somersworth, and Somersworth would have abated the condition before the 1979 accident.

Irving brings her suit pursuant to the FTCA, which does not create a cause of action, but rather provides a broad waiver of the government's traditional sovereign immunity

---

[3] We follow the district court in referring to the most recent version of the regulations; as the district court pointed out, the applicable regulations have not been materially revised since 1973.

from suit, and a grant of federal court jurisdiction over claims against the United States for

> injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). The FTCA further provides that the United States shall be liable in tort "in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674.

In enacting the FTCA, Congress intended to compensate victims of torts committed by government employees, and to eliminate the private bill system which previously provided the sole governmental remedy for such victims.[4] Congress qualified the FTCA's general waiver of sovereign immunity, however, by exempting from its scope certain governmental activity, such as the assessment and collection of taxes, the transmission of postal matter, and the regulation of the monetary system. See 28 U.S.C. § 2680. The "discretionary function exception" precludes suits "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

---

[4] Prior to the passage of the FTCA, redress against the government for property damage or personal injury was essentially limited to the passage of a private bill by Congress. See United States v. Muniz, 374 U.S. 150, 154 (1963); Blessing v. United States, 447 F. Supp. 1160, 1169 n. 11 (E.D. Pa. 1978).

Irving's FTCA claim is premised upon the theory that New Hampshire law imposes liability upon a person who undertakes to conduct a workplace safety inspection and is negligent in failing to notify the employer of a dangerous condition. This theory is based upon New Hampshire's interpretation and application of the well-established common-law doctrine imposing a duty of due care upon those who undertake to act voluntarily, to those who come within the orbit of risk created by the actor's negligence. See Corson, 265 A.2d 315; Smith v. American Employers' Ins. Co., 163 A.2d 564 (N.H. 1960); Brunelle v. Nashua Bldg. & Loan Ass'n, 64 A. 2d 315 (N.H. 1949) (and cases cited therein); Restatement §§ 323, 324A.[5] Irving relies in particular upon

---

[5] Restatement §§ 323 and 324A are typically cited together as expressions of the same principle, see Blessing v. United States, 447 F. Supp. 1160, 1187 & n.39 (E.D. Pa. 1978), which is often referred to as the "Good Samaritan" doctrine. The continued use of this rubric in the case law to refer to the theory of liability embodied in §§ 323 and 324A of the Restatement is unfortunate in view of the fact that the same phrase is now also commonly used to refer to the immunity conferred by state statutes upon "Good Samaritans" who might otherwise be subject to liability for negligence in the course of rescue efforts. See Black's Law Dictionary at 694 (6th ed. 1990). Although we are reluctant to perpetuate any confusion in the case law, we follow the usage of the parties and the district court in order to avoid any confusion in the case sub judice.

Section 323 states the rule as to the liability of the actor to the person to whom she has undertaken to render services. Section 324A, invoked here, states the actor's liability to third persons as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or

Corson, in which an insurance company that conducted periodic safety inspections of the workplace of the insured was held liable to an injured employee for negligence in the conduct of an inspection, specifically, for the failure to call to the attention of the employer the existence of the safety hazard that subsequently injured the plaintiff.

The government moved to dismiss Irving's complaint on two grounds: first, for lack of subject matter jurisdiction, because the conduct of the OSHA inspectors was immunized by the discretionary function exception;[6] second, for failure to state a claim upon which relief may be granted, because the United States, if a private person, would not be liable to Irving under New Hampshire law. Rejecting both arguments, the court denied the government's motion on February 22, 1982. Irving v. United States, 532 F. Supp. 840 (D.N.H. 1982) (Devine, J.).

After the Supreme Court's decision in United States v. S.A. Empresa de Viacao Aerea Rio Grandense ("Varig Airlines"), 467 U.S. 797 (1984), the government renewed its motion to dismiss, arguing that, under Varig Airlines, Irving's claim was barred by the discretionary function exception. The district court denied the renewed motion on August 8, 1984.

Thereafter, the district court conducted a bench trial from February 11 to February 14, 1985. On January 27, 1988,

---

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

[6] Because the discretionary function exception is a limitation on the FTCA's waiver of sovereign immunity, we treat it as a jurisdictional bar, dismissing for lack of subject matter jurisdiction claims to which the exception applies. See, e.g., Kelly v. United States, 924 F.2d 355, 360 (1st Cir. 1991) (citing 28 U.S.C. § 1346(b); Irving v. United States, 909 F.2d 598, 600(1st Cir. 1990)). We note, however, that, to the extent that factual findings are required in order to determine whether the exception immunizes the challenged conduct, it effectively operates more as an affirmative defense. See Blessing v. United States, 447 F. Supp. 1160, 1186 (E.D. Pa. 1978).

nearly three years after having taken the matter under advisement, the district court, citing intervening decisions of this court,[7] reversed its earlier contrary rulings and dismissed Irving's suit without reaching the merits, on the ground that it was barred by the discretionary function exception. Irving appealed, and we vacated and remanded the case for further consideration in light of the Supreme Court's then-recent decision in Berkovitz v. United States, 486 U.S. 531 (1988), which clarified and revised the test to be applied in determining when the discretionary function exception immunizes the challenged conduct. Irving v. United States, 867 F.2d 606 (1st Cir. 1988) (unpublished order).

On remand, the district judge dismissed the suit -- without analyzing the evidence -- on the basis of Galvin v. OSHA, 860 F.2d 181 (5th Cir. 1988), a post-Berkovitz decision which held that, because OSHA had not violated a mandatory statute or regulation in the course of an inspection, the claim was barred by the discretionary function exception. Irving again appealed, and on July 25, 1990, we issued an opinion vacating and remanding the case for a second time. After careful analysis, we concluded that, although it seemed to be undisputed that the compliance officers were required by OSHA to inspect the entire Somersworth plant, and could not choose simply to spot cheek certain areas, the question

---

[7] The cited decisions were Shuman v. United States, 765 F.2d 283 (1st Cir. 1985); Brown v. United States, 790 F.2d 199 (1st Cir. 1986); and K.W. Thompson Tool Co. v. United States, 836 F.2d 721 (1st Cir. 1988). These pre-Berkovitz cases do not govern the analysis or the result in the case before us. To the extent that our more recent FTCA decisions, see, e.g., Dube v. Pittsburgh Corning, 870 F.2d 790 (1st Cir. 1989); Ayer v. United States, 902 F.2d 1038 (1st Cir. 1990); Kelly v. United States, 924 F.2d 355 (1st Cir. 1991); Atallah v. United States, 955 F.2d 776 (1st Cir. 1992); Sea Air Shuttle Corp. V. United States, 112 F.3d 532 (1st Cir. 1997), involve the application of the discretionary function exception, they are consistent with Berkovitz. To the extent that they address the question whether the FTCA claimant states a cause of action under the applicable state law, they have no bearing on this case because the law of the place where the challenged conduct occurred is not New Hampshire law.

whether the discretionary function exception applied to the challenged conduct could not be resolved without further fact finding. Irving v. United States, 909 F.2d 598, 604-05 (1st Cir. 1990). In remanding the case for further proceedings, we directed the district court to make the factual findings required to resolve the issue, as should have been done pursuant to our instructions in the prior appeal. Id.

On June 27, 1994, nearly four years later, the district judge issued a memorandum decision in which he addressed the merits of Irving's claim. After reviewing his trial notes and a partial transcript of the 1985 trial, the district judge found that, at the time of the 1975 and 1978 inspections, the die-out machine was "some two feet closer to the wall to its rear" than it was on the day of the accident. According to the court, the die-out machine "was then in such location that employees working near it would not be exposed to injury" because the "nearness [of the machine] to the wall to its rear would prevent access and probable injury." Based upon this finding, the court concluded that the position of the die-out machine "barred the probability of access to it by any employee working in that area," and that the machine's rotating drive shaft was therefore "guarded by location" at the time of the 1975 and 1978 inspections. Based upon its guarded-by-location finding, the court held that no negligent act or omission on the part of any OSHA employee had occurred during either inspection, and, therefore, there was no violation of New Hampshire's Good Samaritan doctrine. The district court again entered judgment for the United States, and Irving appealed for the third time.

In the third appeal, we responded to the government's renewed argument that the suit was barred by the discretionary function exception and to its contention that this issue could be decided in its favor without further fact finding, by holding that the prior panel's ruling (that the issue could not be decided without further fact finding) was the law of the case, binding on all newly constituted panels in this circuit. Irving v. United States, 49 F.3d 830, 833-35 (1st Cir.

1995). Next, we ruled that the district court's guarded-by-location finding was clearly erroneous. We then vacated the judgment, concluding that this finding was necessary to the district court's entry of judgment in favor of the government, and that for this reason alone, the judgment could not stand. Id. at 835-37. Finally, we granted Irving's request for a trial de novo before a different district judge, with the following instructions: (i) no finding from the previous trial should be given preclusive effect in the new trial; (ii) the government was free to renew its arguments that the discretionary function exception protected the OSHA inspectors' conduct, and that the die-out machine was guarded by location at the time of the inspections; and (iii) the new district judge had the discretion to decide whether to proceed solely on the record thus far developed. Id. at 837.

On remand, Judge McAuliffe, the new district judge, proceeded with the consent of the parties on the basis of the previous bench trial record and transcript, supplemented by dispositive motions and memoranda, but not by new evidence. The court entered judgment for Irving, holding that the discretionary function exception did not bar Irving's FTCA claim; that the United States was liable to Irving under New Hampshire law; and that Irving was not contributorily negligent

II.

In this appeal, the government challenges the judgment of the district court on two grounds: first, that Irving's claim is not actionable under the FTCA because it is based upon duties that arise under federal, rather than state, law; second, that the claim is not actionable for failure to satisfy the FTCA's "analogous private liability" condition because Irving has not established the elements required for the imposition of liability under New Hampshire's Good Samaritan doctrine.

Although the government has argued throughout the sixteen-year course of this litigation that Irving's claim is barred by the discretionary function exception, it does not renew this

argument in the instant appeal. Nevertheless, where they apply, the exceptions enumerated in 28 U.S.C. § 2680 effectively preserve the sovereign immunity of the United States, thereby depriving federal courts of subject matter jurisdiction. See, e.g., United States v. Mitchell, 463 U.S. 206, 212 (1983); Kelly v. United States, 924 F.2d 355, 360 (1st Cir. 1991).[8] For this reason, and because "[p]arties cannot confer subject matter jurisdiction on either a trial or an appellate court by indolence, oversight, acquiescence, or consent," United States v. Horn, 29 F.3d 754, 768 (1st Cir. 1994), we must determine whether the district court erred in ruling that the discretionary function exception does not bar this suit, see Cumberland Farms Inc. v. Tax Assessor, 116 F.3d 943, 945 (1st Cir. 1997).[9]

---

[8] If the plaintiff fails to plead facts sufficient to create liability under the applicable state law, see 28 U.S C. §§ 1346(b), 2674, the claim may be dismissed without consideration of the exceptions enumerated in 28 U.S.C. § 2680. Where the plaintiff states a cause of action under the law of the state where the challenged conduct occurred, however, the court must inquire whether the FTCA claim is barred by the discretionary function exception because, even if the state-law claim is proven, all that would be established is negligence, which is protected by the exception if the negligence is in the permissible exercise of the tortfeasor's discretion. See 28 U.S.C. § 2680(a) (the discretionary function exception protects discretionary conduct "whether or not the discretion involved be abused"); Atallah v. United States, 955 F.2d 776, 784 n.13 (lst Cir. 1992); Ayer v. United States, 902 F.2d 1038, 1041 (1st Cir. 1990).

[9] For this reason, we must also determine whether Irving's claim is barred by the misrepresentation exception, see 28 U.S.C. § 2680(h), as the government argued below, although not in this appeal. In the course of the de novo proceedings, the district court denied the government's motion to dismiss on this ground, holding on the basis of Supreme Court and First Circuit precedent that the misrepresentation exception does not bar Irving's claim because, "[b]y stating a claim under New Hampshire's Good Samaritan doctrine, Irving has alleged breach of a duty that is distinct from the duty recognized by the tort of negligent misrepresentation." Order of March 13, 1996. See also Irving, 942 F. Supp. at 1505 n.28. We agree with the court's analysis and are satisfied that 28 U.S.C. § 2680(h) does not remove federal court jurisdiction over the claim.

As always, we review de novo the district court's rulings of law, and scrutinize the court's findings of fact and apportionment of liability for clear error. See, e.g. Soto v. United States, 11 F.3d 15, 17 (1st Cir. 1993).

A.

In order to determine whether or not the discretionary function exception applies to the challenged conduct, we must consider the OSH Act and the legal framework pertaining to the conduct of workplace safety inspections.

In enacting the OSH Act, Congress sought "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). To accomplish this goal, the OSH Act created OSHA and gave it expansive authority to set mandatory safety and health standards, 29 U.S.C. §§ 651(b)(3), (b)(9); to inspect workplaces to ensure compliance with those standards, 29 U.S.C. § 657; and to issue citations and impose penalties for violations of those standards, 29 U.S.C. §§ 658, 659.

The statute imposes two kinds of duties upon employers: (i) a general duty to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm," 29 U.S.C. § 654(a)(1); and (ii) the duty to comply with OSHA standards, 29 U.S.C. § 654(a)(2). Employees must be kept informed of their protections and obligations under the OSH Act through, inter alia, the posting of notices in the workplace. 29 U.S.C. § 657(c)(1); 29 C.F.R. § 1903.2.

Similarly, we reject Irving's contention that the government has failed to preserve the argument that her claim is not actionable under the FTCA for failure of the analogous private liability condition. To the extent that the government argues that Irving fails to state a claim under New Hampshire law, the argument cannot be waived because, by its terms, the FTCA's waiver of sovereign immunity is conditioned upon the existence of a state-law cause of action.

Although the OSH Act itself does not specify where, when, or how OSHA is to conduct the inspections it authorizes, OSHA regulations promulgated pursuant to 29 U.S.C. § 655 empower OSHA area directors and compliance officers to decide where and when to make workplace inspections, 29 C.F.R. § 1903.7(a), and authorize compliance officers to employ "reasonable investigative techniques" in the conduct of inspections, 29 C.F.R. § 1903.7(b). An OSHA pamphlet explains that "[e]very establishment covered by the Act is subject to inspection by OSHA compliance safety and health officers, who are chosen for their knowledge and experience in the occupational safety and health fields, and trained rigorously in OSHA standards and in recognition of the hazards they cover." See OSHA Programs and Policy Series pamphlet, "All About OSHA" (April 1976 ed.) (Pl. Exhibit 18).

Upon completing a workplace inspection, the OSHA compliance officer "shall" hold a closing conference with the employer, at which, inter alia, the officer is required to advise the employer of any violations disclosed by the inspection. 29 C.F.R. § 1903.7(e). The OSHA area director "shall" review the compliance officer's inspection report, which details all the violations that were observed during the inspection. 29 C.F.R. § 1903.14(a). If, based upon the officer's inspection report, the area director determines that the employer has violated an OSHA standard, she "shall" issue to the employer either a citation or a notice of a de minimis violation. 29 U.S.C. § 658(a); 29 C.F.R. § 1903.14(a).

29 U.S.C. § 652(8) defines "occupational safety and health standard" as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." A violation is "de minimis" if it has "no direct or immediate relationship to safety or health." 29 U.S.C. § 658(a); 29 C.F.R. § 1903.14(a). A violation is "serious" if there is "a substantial probability that death or serious

physical harm could result from" the violative condition. 29 U.S.C. § 666(k). Violations that are neither de minimis nor serious are categorized as "non-serious." 29 U.S.C. § 666(c).

The OSH Act provides that OSHA "shall with reasonable promptness" issue a citation to the employer for a serious or nonserious violation of an OSHA standard, fixing a reasonable time for abatement of the condition; "shall" assess a civil penalty for each serious violation; and "may" assess a civil penalty for each nonserious violation. 29 U.S.C. §§ 658(a), 666(b), (c); 29 C.F.R. §§ 1903.14(a), (b). The employer is required to post a copy of each citation at or near the site of the violation, 29 U.S.C. § 658(b); 29 C.F.R. § 1903.16, and to abate cited violations within the prescribed period of time, 29 U.S.C. § 658(a); 29 C.F.R. § 1903.14(b).

B.

From the face of the FTCA, it would appear that the United States has consented to Irving's suit if the challenged conduct is not exempted from the scope of the FTCA's waiver of sovereign immunity by one of the exceptions enumerated in 28 U.S.C. § 2680, and that Irving states a claim under the FTCA if a private individual in like circumstances would be subject to liability under New Hampshire tort law. But the Supreme Court's reading of the FTCA "has not followed a straight line," Varig Airlines, 467 U.S. at 811, and there is little in the way of unequivocal guidance to be found in the FTCA case law of the lower federal courts. As we have observed, the law in this area is a "'patchwork quilt,'" Dube v. Pittsburgh Corning, 870 F.2d 790, 796 (1st Cir. 1989) (quoting Blessing v. United States, 447 F. Supp. 1160, 1167 (E.D. Pa. 1978)), reflecting markedly different analytical approaches, to say nothing of the variations that arise by virtue of the application of different states' tort law to different claims.

This appeal thus requires us to construe legal principles that, although well established, have been interpreted and applied with breathtaking variety. For this reason, and

because "[t]his is one of those cases that a judge is likely to leave by the same door through which [she] enters," Dalehite v. United States, 346 U.S. 15, 49 (1953) (Jackson, J., dissenting), we take considerable pains to discern and to follow the congressional commands embodied in the FTCA, lest we enter and exit through the wrong door. Foremost in our thoughts is the Supreme Court's recent admonition, "'We should . . . have in mind that the [FTCA] waives the immunity of the United States and that . . . we should not take it upon ourselves to extend the waiver beyond that which Congress intended. Neither, however, should we assume the authority to narrow the waiver that Congress intended.'" Smith v. United States, 507 U.S. 197, 203 (1993) (quoting United States v. Kubrick, 444 U.S. 111, 117-18 (1979))

1.

In enacting the FTCA, Congress did not list the specific circumstances in which the United States may be held liable for the torts of its employees acting within the scope of their employment. Instead, Congress broadly and generally waived the sovereign immunity of the United States, see 28 U.S.C. §§ 1346(b), 2674, enumerating the circumstances in which the waiver would not apply, see 28 U.S.C. § 2680, and adopting state-law causes of action as the basis for the imposition of liability based upon fault, see 28 U.S.C. §§ 1346(b), 2674.[10] Although no statutory exception explicitly or generally bars suits based upon the negligence of government employees in the conduct of federal regulatory activities, the discretionary function exception exempts from the scope of the FTCA's waiver claims "based upon the exercise or performance or the failure to-exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the

---

[10] Although 28 U.S.C. §§ 1346(b) and 2674 contain parallel language, and the cases read these provisions together as defining the scope of the United States' consent to suit, it is § 1346(b) that grants federal court jurisdiction over suits falling within the scope of the waiver.

Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

The Supreme Court has characterized the discretionary function exception as "mark[ing] the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals," Varig Airlines, 467 U.S. at 808, and as embodying the measures taken by Congress "'to protect the Government from liability that would seriously handicap efficient government operations,'" id. at 814 (quoting United States v. Muniz, 374 U.S. 150, 163 (1963)).[11] The exception has proven to be difficult to apply, in part because Congress neither clearly defined "discretionary function" nor clearly expressed the specific policy concerns underlying the exemption of discretionary functions from the FTCA's general waiver of sovereign immunity.

The Supreme Court has analyzed the nature and scope of the discretionary function exception in a series of cases, beginning with Dalehite, 346 U.S. 15, in which the Court delineated the contours of the exception broadly, explaining that protected discretionary functions are not limited to "the initiation of programs and activities," 346 U.S. at 35; that "[w]here there is room for policy judgment and decision there is discretion" id. at 36; and that "acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable," id.

---

[11] See Blessing, 447 F. Supp. at 1170-71 (explaining that the discretionary function exception was designed to embody the traditional doctrines of separation of powers and judicial restraint, and "articulate a policy of preventing tort actions from becoming a vehicle for judicial interference with decision making that is properly exercised by other branches of the government"); Smith v. United States, 375 F.2d 243, 248 (5th Cir. 1967) (the discretionary function exception immunizes the United States from liability, not because government officials made choices, "but because the choices made affected the political (not merely the monetary) interests of the nation").

In Varig Airlines, 467 U.S. 797,[12] the Court deemed the following factors "useful" in determining when the conduct of a government employee is immunized by § 2680(a). First, the Court explained, "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." 467 U.S. at 813. Thus, the inquiry "is whether the challenged acts . . . are of the nature and quality that Congress intended to shield from tort liability." Id. Second, the Court observed,

> whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals. . . . This emphasis upon protection for regulatory activities suggests an underlying basis for the inclusion of an exception for discretionary functions in the Act: Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.

Id. at 813-14 (footnote omitted).

---

[12] In Varig Airlines, the Court consolidated for decision two cases, Varig Airlines v. United States, 692 F.2d 1205 (9th Cir. 1982), and United Scottish Ins. v. United States, 692 F.2d 1209 (9th Cir. 1982) (appeal after remand from United Scottish Ins. Co. v. United States, 614 F.2d 188 (9th Cir. 1-979)), involving challenges to two actions by the Federal Aviation Administration ("FAA") in certifying for commercial use two airplanes that later caught fire in flight: (i) the FAA's decision to formulate and implement a spot-check inspection system of reviewing aircraft manufacturers' compliance with required minimum safety standards; and (ii) the spot-check inspectors' specific decisions to certify the airplanes as safe. Applying the principles outlined above, the Court held that the discretionary function exception applied to both the FAA's decision to adopt and implement a spot-check system of compliance review, and the acts of FAA employees in executing that system. See 467 U.S. at 819-20.

In Berkovitz v. United States, 486 U.S. 531 (1988),[13] the Court further refined the discretionary function analysis. First, reasoning that "conduct cannot be discretionary unless it involves an element of judgment or choice," the Court instructed, "[i]n examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee." 486 U.S. at 536. Thus, the Court explained,

> the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect.

Id. (citation omitted).

Second, "assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield," id., because the exception

---

[13] In Berkovitz, the plaintiffs alleged violations of federal law and policy by government employees in the course of (i) the inspection and approval of vaccines by the National Institutes of Health's Division of Biologic Standards ("DBS") in licensing Lederle Laboratories to produce a polio vaccine; and (ii) the approval and release to the public by the Bureau of Biologics of the Food and Drug Administration of the particular lot of vaccine that contained the dose that Berkovitz ingested (after which he contracted polio).

The Court held, inter alia, that, to the extent that the licensing claim was based upon a decision by the DBS to issue a license without having first received from the manufacturer test data required by the governing statute and regulations, the claim was not barred by the discretionary function exception because the DBS had no discretion to issue a license without first receiving the required data, and to do so would violate a specific statutory and regulatory directive. 486 U.S. at 542-43.

"protects only governmental actions and decisions based on considerations of public policy," id. at 537 (citation omitted).

In the course of its analysis, the Berkovitz Court pointedly narrowed some of the sweeping language in Varig Airlines, and emphatically rejected the argument that the discretionary function exception is to be read as a regulatory function exception:

> In restating and clarifying the scope of the discretionary function exception, we intend specifically to reject the Government's argument . . . that the exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies. . . . [I]n Varig, we ignored the precise argument the Government makes in this case, focusing instead on the particular nature of the regulatory conduct at issue. To the extent we have not already put the Government's argument to rest, we do so now. The discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment.

Id. at 538-39.

In United States v. Gaubert, 499 U.S. 315 (1991), the Court -- after reaffirming the two-part test applied in Berkovitz -- concluded that "[w]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion," reasoning that "the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." 499 U.S. at 324.

The Gaubert Court emphasized, however, that, although many decisions and acts of government officials involve a large degree of choice, those that are "not the kind of conduct that can be said to be grounded in the policy of the regulatory

regime" are not immunized by the exception. Id. at 325-26 & n.7. If a regulation or policy mandates particular conduct and the government employee violates it, "there will be no shelter from liability because there is no room for choice and the action will be contrary to policy." Id. at 324. As it did in Varig Airlines and Berkovitz, the Court stated that the focus of the discretionary function inquiry is "on the nature of the actions taken and on whether they are susceptible to policy analysis." Id. at 325 (footnote omitted).

Thus, in order to determine whether the discretionary function exception immunizes the conduct challenged in this case, we must focus on the conduct at the level of the particular act or omission, and ask whether that act or omission involves an element of judgment or choice. If we determine that it does, we must then inquire whether the discretionary act or omission is based upon considerations of public policy. See Kelly, 924 F.2d at 360; Ayer v. United States, 902 F.2d 1038, 1041 (1st Cir. 1990).

2.

The district court held that the conduct of the OSHA officers in failing to observe and document the violative condition that caused Irving's injuries was not immunized by the discretionary function exception. We affirm this ruling.

As we noted in the second appeal in this case, it does not follow from the fact that the governing statute and regulations give OSHA "wide freedom at higher agency levels to make decisions and formulate programs concerning the inspection of workplaces" that "an employee who performs an inspection has the type and breadth of discretion which makes the inspection a discretionary function." 909 F.2d at 603. Rather, Berkovitz requires that we determine whether a particular function is discretionary by looking at "the range of choice the agency delegates to the employee who performs the task in question." Id. Accordingly, we concluded that, assuming an ultimate finding to the effect that the conduct challenged here was not within the range of choice accorded to OSHA

compliance officers by federal law or policy, the result of the discretionary function analysis

> will be controlled by the plain statement in Berkovitz that if an agency's "policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not involve the exercise of such judgment, the discretionary function exception does not bar a claim that the act was negligent or wrongful."

909 F.2d at 601-02 (quoting Berkovitz, 486 U.S. at 546-47).

In the course of his discretionary function analysis, the district judge made the following findings: (i) in 1975 and 1978, the OSHA compliance officers each had been directed to perform a "wall-to-wall" safety inspection of the Somersworth plant; (ii) although the OSH Act and OSHA regulations leave many decisions regarding the conduct of workplace inspections to the discretion of the area director and compliance officers, the scope of the inspections of the Somersworth plant that the compliance officers were instructed to perform in 1975 and 1978 "was dictated by less formal, but no less binding, OSHA policy," requiring the officers to inspect each operational machine and work station in the plant, and-to record every violation of OSHA safety standards that they observed -- be they de minimis, non-serious, or serious -- if there was potential employee exposure to the violative condition; (iii) the die-out motor drive shaft was not guarded by location at the time of the accident; (iv) at the time of the accident, the die-out machine was in materially the same condition, and was at or near the place it had been located during the 1975 and 1978 inspections, and, therefore, the drive shaft had not been guarded by location at the time of these inspections; (v) the die-out machine was in near-continuous operation during the relevant time period, and was in operation during both inspections; (vi) operation of the die-out machine while the drive shaft remained unguarded was in flagrant violation of OSHA safety standards; (vii) during the 1975 and 1978

inspections, the compliance officers failed to document, and OSHA failed to cite, the violative condition of the drive shaft; (viii) had the compliance officers actually inspected the bench assembly, they would have noticed and documented the violative condition of the drive shaft.[14] 942 F. Supp. at 1492-1502.

---

[14] Four OSHA employees testified at the 1985 bench trial: Richard Amirault, the area director at the time of the 1975 and 1978 inspections; William Chase, the compliance officer who conducted the 1975 inspection; John M. Ritchie, the compliance officer who conducted the 1978 inspection; and Paul O'Connell, the senior safety engineer who conducted the 1979 post-accident inspection.

Amirault testified that OSHA compliance officers were "charged to look at the entire plant"; that, in conducting a wall-to-wall inspection, the compliance officers "were supposed to make a complete walk-through and identify and document any hazardous conditions that they would see"; and that, "[a]s far as humanly possible, [the inspectors] were supposed to cover the work place" and "observe any place where the employee works." Although Amirault repeatedly testified that the compliance officers were required only to report the violations they observed -- e.g., "If we could spot the unsafe condition, it should be cited." -- he also testified that the inspectors "should look at every operation" and "should be observing and documenting any violative condition."

Chase conceded that it would have been carelessness for a compliance officer to have missed the violative condition of the drive shaft. He testified that, in 1975, "I made a complete inspection of the facility as I am required to do and made notes, et cetera, of everything that I observed." While acknowledging that inspectors occasionally fail to notice violative conditions, Chase testified that, if the bench assembly were in the same location at the time of his 1975 inspection as it was at the time of the accident, he could not have failed to recognize the condition of the drive shaft as a serious violation of OSHA standards. He stated, "I deny anybody to say they haven't [made a mistake] but not something that obvious." And, "I wouldn't miss something like that; it's too obvious, positively." He also stated, "[T]here's no way I'd have missed that setting right out in the wide open on a main aisle in . . . the stock fitting room. No way." According to Chase, no compliance officer who looked at the bench assembly would have failed to recognize the unguarded drive shaft as a serious violation, even on the officer's worst day. Amirault and O'Connell concurred in Chase's conclusion that the violation was both obvious and serious, with Amirault conceding that a prudent inspector who saw the

The district court concluded from the evidence that the record would not support a finding that OSHA Compliance Officers William Chase and John M. Ritchie -- both of whom the court found to be experienced workplace safety inspectors who took their jobs seriously -- were so utterly incompetent as to have inspected the bench assembly but failed to notice the unguarded condition of the drive shaft and to recognize it as a violation of OSHA standards. Instead, the preponderance of the evidence "decidedly supports the conclusion that both Chase and Ritchie would have recognized that the bench assembly violated OSHA safety standards requiring the guarding of power transmissions if they had, in fact, inspected it," and that the only realistic explanation for their failure to notice and document the unguarded drive shaft was that neither officer actually inspected the bench assembly during his inspection of the Somersworth plant. 942 F. Supp. at 1497. The district court thus determined that the challenged conduct, and the basis for Irving's state-law cause of action and FTCA claim, was the failure of the compliance officers to inspect every operational machine in the Somersworth plant in 1975 and 1978, as they were required to do by mandatory OSHA policy. Id.

Our review of the record leads us to conclude that the district court's findings are not clearly erroneous. See Fed. R. Civ. P. 52(a); Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985); Johnson v. Watts Regulator Co., 63 F.3d 1129, 1138 (1st Cir. 1995). Nothing in the record indicates that the inspections ordered in 1975 and 1978 were something other than wall-to-wall inspections, or that OSHA compliance officers were at liberty to choose to conduct a spot-check inspection of only some, not all, machines or areas within the plant. In all events, the government does not now dispute the obligations of compliance officers in 1975 and 1978 in conducting wall-to-wall safety inspections; indeed, the

---

bench assembly depicted in O'Connell's post-accident photographs should have noticed the unguarded condition of the drive shaft and recognized it as a violation of OSHA safety standards.

government's attorney conceded at oral argument before the district court that "[i]f there's a requirement to look at every machine and he does not look at every machine, then I would agree that that's a violation of a mandatory regulation." See 942 F. Supp. at 1499 n.19.

Nor do we find error in the district court's application of the law. In the course of its analysis, the court stated that it was "neither here nor there" that the compliance officers were under no mandatory duty to find every violative condition. Id. at 1502. Instead, "[w]hat is important is that they were under a mandatory duty to inspect every operational machine and failed to do so. In fact, it was by inspecting every operational machine that OSHA expected to meet its goal of identifying and eliminating all workplace safety hazards to the extent humanly possible." Id.

The court observed that the discretionary function exception would bar Irving's claim if it were based upon (i) a failure of OSHA inspectors to inspect the Somersworth plant at all; or (ii) a failure to notice and document the violative condition of the drive shaft if OSHA had adopted and implemented a spot-check inspection system, or if OSHA had left it to compliance officers to determine which machines within a facility to inspect; or (iii) a failure to cite the violative condition of the drive shaft if the compliance officers had inspected the bench assembly but had wrongly concluded that there was insufficient risk of employee exposure to justify proposing a citation,[15] or if the compliance officers had erroneously categorized a serious violation as de minimis. Id. at 1500. The court concluded that

---

[15] We note that the panel in the second appeal in this case suggested that even this might not be protected conduct in the circumstances presented here. See 909 F.2d at 605 ("the inference could be drawn that rather than being a judgment call, a violation of the type which caused Ms. Irving's injury was so obvious that failure to report it was not within a compliance officer's discretion").

> while the discretionary function exception would bar many, if not most, suits arising from negligent OSHA inspections, it does not bar Irving's suit. This is so because none of the scenarios advanced by the government actually occurred in this case. Instead, Chase and Ritchie failed to inspect the bench assembly at issue despite a mandatory duty to inspect it. Under Berkovitz, Irving may sue the government for that failure.
>
> . . . While Irving cannot maintain a suit based on the government's failure to properly perform a discretionary function, she may indeed sue for breach of mandatory duties that did, in fact, occur.

Id. at 1500-01 (footnotes omitted).

We agree with the district court. While the statutory provision and regulation authorizing OSHA inspections may devolve broad discretion upon OSHA officers as to when and where to inspect, the evidence in this case permitted the court to find, by a preponderance of the evidence, that the OSHA inspectors in this case had no discretion to make independent policy judgments as to what was to be inspected, once the discretionary decision to inspect the plant had been made. Accordingly, the district court correctly concluded that the discretionary function exception does not bar this FTCA claim. See Berkovitz, 486 U.S. at 542-44; Myers v. United States, 17 F.3d 890, 897-98 (6th Cir. 1994); Irving, 909 F.2d at 601-04.[16]

---

[16] See also Ayala v. United States, 980 F.2d 1342, 1349-51 (10th Cir. 1992); Summers v. United States, 905 F.2d 1212, 1215-16 (9th Cir. 1990); Caplan v. United States, 877 F.2d 1314, 1316 (6th Cir. 1989); Camozzi v. Roland/Miller & Hope Consulting Group, 866 F.2d 287, 289-90 (9th Cir. 1989); McMichael v. United States, 856 F.2d 1026, 1033-34 (8th Cir. 1988).

Many of the pre-Berkovitz decisions holding that FTCA suits based upon negligence in the conduct of federal regulatory inspections are barred by the discretionary function exception do not inquire into the

III.

The district court concluded that Irving's claim states a cause of action under New Hampshire law, citing the Supreme Court of New Hampshire's decision in Corson, 265 A.2d 315. The court viewed Corson as presenting "a situation that is the precise private analogue to that presented here," Irving, 942 F. Supp. at 1503, because "OSHA undertook to provide precisely the same service considered in Corson and contemplated by section 324A of the Restatement -- 'to assist accident prevention by additional inspections and advice rendered to the company primarily charged with the duty' to ensure workplace safety," id. at 1503-04 (quoting Corson, 265 A.2d at 317) (footnote omitted).

Noting that Area Director Richard Amirault had testified that OSHA inspections "'provided a lot of assistance to employers' as they strove to meet their obligation to prevent workplace accidents," the district court found that the "obvious similarity" between the inspection in Corson, performed by an insurer, and the 1975 and 1978 inspections performed by OSHA "is underscored by the testimony of Bruce Brooks," a Somersworth employee, who "never distinguished between the private inspectors and OSHA

---

discretionary authority of the individual inspector to engage in particular conduct, but rely upon the general discretionary authority accorded government agencies over the conduct of inspections. See Merklin v. United States, 788 F.2d 172 (3d Cir. 1986); Cunningham v. United States, 786 F.2d 1445 (9th Cir. 1986); Russell v. United States, 763 F.2d 786 (10th Cir. 1985); General Pub. Utils. Corp. v. United States, 745 F.2d 239 (3d Cir. 1984). As noted above, however, Berkovitz expressly disavowed such an approach.

In Galvin v. OSHA, 860 F.2d 181 (5th Cir. 1988) (the post-Berkovitz case cited by the district court in one of the earlier orders dismissing Irving's claim), it appears that the plaintiff advanced no argument that compliance officers had negligently failed to follow a mandatory OSHA directive. See also Judy v. United States Dept. of Labor, 864 F.2d 83 (8th Cir. 1988); Cordiero v. Brock, 698 F. Supp. 373 (D. Mass.), aff'd sub. nom. Cordiero v. Secretary of Labor, 860 F.2d 1073 (1st Cir. 1988); Silva v. Brock, 677 F. Supp. 55 (D. Mass. 1988).

compliance officers who periodically inspected the plant. From his point of view, both types of inspections served the single purpose of identifying and correcting unsafe working conditions." Id. at 1504 & n.25 (record citations omitted).

With this reasoning, the district court disposed of what we consider to be the most difficult question in this case; viz., does the FTCA's "analogous private liability" condition shield the United States from liability for the negligence of government employees in the course of conduct undertaken for a uniquely governmental purpose, even if a private individual could engage in similar activity? Put another way, if New Hampshire law would impose liability upon a private workplace safety inspector in circumstances similar to those presented here, is an FTCA claim based upon negligence in the conduct of an OSHA compliance inspection nevertheless rendered non-actionable because a private individual could never conduct a workplace safety inspection for the uniquely governmental purpose of ensuring a workplace employer's compliance with federal safety regulations?

The government raises this issue in a rather oblique manner, arguing that Irving's claim is not actionable under the FTCA because it is "rooted in federal law," and because Irving has failed to establish the elements of her underlying state-law Good Samaritan claim, and therefore has failed to satisfy the analogous private liability requirement. Underlying both arguments, however, is the contention that the duties and functions involved in the performance of an OSHA compliance inspection are uniquely governmental in nature, and, for this reason, an FTCA claim alleging negligence in the conduct of such an inspection is barred as a matter of federal law. After careful consideration, we conclude for the reasons that follow that the FTCA contains no general exemption that immunizes conduct in the course of federal regulatory inspections, and that Irving has established the elements necessary to justify the imposition of liability in tort under New Hampshire law.

A.

In considering the government's challenges to the judgment of the district court, we have in mind the following guiding principles of law.

The FTCA directs that (i) the sovereign immunity of the United States is waived where (a) in similar circumstances, a private person would be liable to the FTCA claimant under the law of the place where the challenged conduct occurred, and (b) the challenged conduct is not immunized by any of the exceptions enumerated in 28 U.S.C. § 2680; and (ii) where sovereign immunity is waived, the liability of the United States for the negligence of its employees is to be determined under the law of the place where the challenged conduct occurred, as if the government actor were a private individual.

The FTCA thus instructs courts to determine under federal law the question whether Congress has preserved the sovereign immunity of the United States in the circumstances presented by exempting the challenged conduct under § 2680. See Muniz, 374 U.S. at 164 ("[w]hether a discretionary function is involved is a matter to be decided under 28 U.S.C. § 2680(a)"); United States v. Neustadt, 366 U.S. 696, 705-06 (1961) (the question whether a claim is outside the intended scope of the FTCA "depends solely upon what Congress meant by the language it used in § 2680[]"); Hydrogen Tech. Corp. v. United States, 831 F.2d 1155, 1161 (1st Cir. 1987) ("Since the exceptions set out in section 2680 define the limits of that statutory waiver, they must be construed as a matter of federal, not state, law."). On the other hand, the question of liability under the FTCA must be decided under state law as it applies to private individuals. See 28 U.S.C. §§ 1346(b), 2674; Neustadt, 366 U.S. at 706 n. 15 ("Under the [FTCA], when a claim is not barred by one of the Act's exclusionary provisions, the liability of the Government must be determined 'in accordance with the law of the place where the

act or omission occurred.'"). As the Supreme Court has observed,

> In the Tort Claims Act Congress has expressly stated that the Government's liability is to be determined by the application of a particular law, the law of the place where the act or omission occurred, and we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. We believe that it would be difficult to conceive of any more precise language Congress could have used to command application of the law of the place where the negligence occurred than the words it did employ in the Tort Claims Act.

Richards v. United States, 369 U.S. 1, 9 (1962) (footnote omitted).

It follows that, in adjudicating FTCA claims, the law of the state where the challenged conduct occurred is the only controlling authority as to the question of negligence, including the interpretation and application of the Good Samaritan theory of liability. As to the determination of negligence, then, we are not bound by the law of this circuit or by the case law of other circuit courts interpreting the Good Samaritan doctrine, except to the extent that these authorities correctly interpret and apply New Hampshire tort law. See Birnbaum v. United States, 588 F.2d 319, 327-28 (2d Cir. 1978) ("by adopting the 'law of the place' as the source for rules of decision under the [FTCA], congress expressly negated any possible inference that federal courts were to exercise any 'common law-making' power to fashion torts under the Act in the interest of national uniformity") (footnote and citation omitted). See also FDIC v. Meyer, 510 U.S. 471, 478 (1994); Crider v. United States, 885 F.2d 294, 296 (5th Cir. 1989); United Scottish Ins. Co. v. United States, 614 F.2d 188, 195-96 (9th Cir. 1979).

Accordingly, having determined that Irving's suit is not barred by 28 U.S.C. § 2680, if we find that Irving states a claim under New Hampshire law, we are not at liberty to decree that the United States nevertheless escapes liability by operation of some judicially legislated principle that reinstates sovereign immunity where the statute itself has not done so.[17] See, e.g., Smith, 507 U.S. at 203 (courts should neither narrow nor extend the scope of the FTCA's waiver beyond that which Congress intended); Rayonier Inc. v. United States, 352 U.S. 315, 320 (1957) ("There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."); Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955) ("Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-appointed guardian of the Treasury import immunity back into a statute designed to limit it."); United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 383 (1949) ("'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'") (quoting Anderson v. Hayes Constr. Co., 153 N.E. 28, 29-30 (N.Y. 1926) (Cardozo, J.))

---

[17] The Supreme Court's holding in Feres v. United States, 340 U.S. 135, 146 (1950), that "the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service," represents the only non-statutory immunity to FTCA liability of which we are aware. Although this judicially crafted immunity has been extended to shield the United States from liability for service-related injuries resulting from the negligence of civilian employees of the federal government, see United States v. Johnson, 481 U.S. 681 (1987), and from the negligence of military contractors, see Boyle v. United Techs. Corp., 487 U.S. 500 (1988), the holding and reasoning of Feres has been limited to the military context, see Indian Towing v. United States, 350 U.S. 61, 69 (1955).

Finally, although the duty element of the state-law negligence cause of action underlying the FTCA claim may not be defined solely by federal law, we may, consistent with the FTCA and well-established common-law tort principles, consider a duty arising solely under federal law as evidence of the scope of the duty owed to the FTCA claimant under state tort law. See Johnson v. Sawyer, 47 F.3d 716, 728 (5th Cir. 1995) (en banc); Schindler v. United States, 661 F.2d 552, 560-61 (6th Cir. 1981); Blessing, 447 F. Supp. at 1189; Murray v. Boston & Maine R.R., 224 A.2d 66, 69-71 (N.H. 1966).

B.

1.

The government contends that Irving's claim is barred as a matter of law because "the only context in which OSHA even arguably owed any duty to the plaintiff is under federal law," and "the only duty found to have been breached in this case was one based upon federal law." We disagree.

First, it is important to recognize that, although Irving points to the obligation of OSHA officers to follow mandatory OSHA policy for the purpose of demonstrating that the challenged conduct is not immunized by the discretionary function exception, for the purpose of establishing the elements of her underlying state-law negligence claim, Irving posits as the source of the government's duty of care, not OSHA policy or any federal law, but the New Hampshire common-law duty to use reasonable care when undertaking to act voluntarily. We find this approach to be eminently sound, if not inevitable, in view of the congressional commands embodied in sections 1346(b), 2674, and 2680 of the FTCA. See Myers, 17 F.3d at 901 n.13 (recognizing the analytical distinction between the discretionary function inquiry and the question whether liability would attach to the conduct under state law); Dube, 870 F.2d at 796 n.8 ("The regulations are relevant not in

establishing a duty, but in establishing whether Navy officials' failure to take steps to protect [the plaintiff] was discretionary.").

Second, the cases cited by the government in support of this argument are largely inapposite because they involve state-law tort theories of liability other than the Good Samaritan doctrine, see, e.g., Chen v. United States, 854 F.2d 622 (2d Cir. 1988); or because the existence vel non of a state-law duty is determined by a different state's law, see, e.g., Myers, 17 F. 3d 890; or because the plaintiffs, in contrast to Irving, rely solely upon a duty arising under federal law, see, e.g, Atallah v. United States, 955 F.2d 776 (1st Cir. 1992).

For example, the government cites our decision in Zabala Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977), in which the plaintiffs, seeking to recover damages for the deaths of passengers who died in an airplane crash, sued the United States under the FTCA for the failure of FAA employees to follow an internal FAA order requiring employees to warn the crew and passengers of chartered aircraft when an aircraft was in violation of federal regulations. There, we recognized that the "critical question" was "whether the FAA staff in Puerto Rico was under a duty to inspect the aircraft and to warn plaintiffs' decedents of any irregularities." 567 F.2d at 1143. While acknowledging that courts have consistently rejected the government's invocation of its sovereignty to distinguish its conduct from that of private persons, we noted that "this decision to ignore the government's sovereignty operates in the reverse direction as well." Id. at 1144. Thus, we stated that, "even where specific behavior of federal employees is required by federal statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability." Id. at 1149.

For a number of reasons, we think that Zabala Clemente presents a different situation from the instant case. Most importantly, we concluded in Zabala Clemente that the

government's duty in that case -- defined as the duty to warn passengers that the aircraft was overloaded and lacked a proper crew -- was predicated, not upon state law, as required by the FTCA, but solely upon the internal FAA order requiring a warning to passengers in such circumstances, and that, even assuming that the order was mandatory, this duty "is owed by the employees to the government and is totally distinguishable from a duty owed by the government to the public on which liability could be based." Id. at 1144-45.[18]

The government points out that in Zabala Clemente we quoted with approval Davis v. United States, 395 F. Supp. 793, 79596 (D. Neb. 1975), aff'd, 536 F.2d 758 (8th Cir. 1976), as follows:

> The court could find no indication that any law permits Nebraska to place upon private persons the duties cast upon federal officers by OSHA. The Act's thrust is to require designated federal officers to investigate, issue citations, and apply for enforcement orders by a federal court. Nothing resembling those duties devolves on a private

---

[18] Although the Zabala Clemente panel did not discuss whether Puerto Rico law recognizes a Good Samaritan cause of action, or whether the plaintiffs, in fact, alleged such a claim, the panel did discuss the possibility that a claim might have been predicated upon the Good Samaritan doctrine. The panel ruled, however, that liability would not be established under that theory because the plaintiffs could not satisfy any one of the three disjunctive requirements for the imposition of liability under the doctrine as formulated in §§ 323 and 324A of the Restatement. 567 F.2d at 1145. In this regard, it is important to note that, to the extent that the decision in Zabala Clemente turned on the application of the Good Samaritan doctrine, it nevertheless does not control our analysis of the merits of Irving's claim because the FTCA directs us to apply New Hampshire law in this case, not Puerto Rico law.

We add that our recent decision in Sea Air Shuttle Corps. v. United States, 112 F.3d 532 (lst Cir. 1997), does not control our analysis here for the same reasons that Zabala Clemente does not i.e., -- the claim in Sea Air Shuttle did not invoke a state-law duty and the determination of liability did not turn on New Hampshire law.

> person under OSHA. . . . To the extent that the complaint in the case at bar is rooted in federal law as a source of duties of the United States or its compliance officer, it must fall."

Zabala Clemente, 567 F.2d at 1149-50.

But, in contrast to the plaintiffs in Zabala Clemente and Davis, Irving bases her underlying state-law cause of action on the independently cognizable duty under New Hampshire law to use due care when undertaking to act; in particular, when undertaking to conduct workplace safety inspections. See Corson, 265 A.2d 315; Smith, 163 A.2d 564. See also Kirk v. United States, 604 F. Supp. 1474 (D.N.H. 1985) (applying New Hampshire law).

Finally, the government contends that no "non-federal relationship" existed between the plaintiff and OSHA in this case. To the extent that the government suggests this as a basis for precluding FTCA liability as a matter of law, we reject the argument. It does not follow from the fact that a "federal relationship" exists between the parties that no "non-federal relationship" exists; although a federal duty may govern the conduct of a government employee in a given circumstance, a state-law-duty may very well arise as a consequence of the activity itself. See Art Metal-U.S.A. Inc. v. United States, 753 F.2d, 1151, 1158 n.12 (D.C. Cir. 1985); United Scottish, 614 F.2d at 197-98 & n.9. Moreover, New Hampshire law analyzes the duty of care required of those who undertake to act quite apart from the particular reason behind the undertaking, and focuses the inquiry upon the relationship between the parties that arises as a result of the undertaking. See Brunelle, 64 A.2d at 318 (it is "immaterial" that tort liability relates to the same subject matter as a contract between the parties; "[i]t is the fact of the parties[']relationship and not the manner in which it arises which is decisive"); Smith, 163 A.2d at 567.

Thus, even accepting, arguendo, that no FTCA claim may lie where a government official acts pursuant to a duty

imposed by federal law because no such duty could ever devolve upon a private individual, we are not compelled to conclude as a matter of law that no FTCA claim lies in this case because, here, the underlying state-law claim is not predicated solely upon a duty "rooted in federal law," as the government insists, but upon a recognized and independently cognizable state-law duty to exercise due care in undertaking to act, in particular, in conducting workplace safety inspections.

Given that the FTCA grounds liability in state law as it applies to private individuals, it is true as a matter of statutory interpretation that, standing alone, a government official's violation of a federal statute, regulation, guideline, or policy does not itself provide the basis for an FTCA claim, see, e.g;, Art Metal-U.S.A., 753 F.2d at 1157 (collecting cases), because the federal-law-based duties of government officials do not automatically create duties under state tort law, id at 1158.

But the obverse principle also obtains; viz., where the applicable state law imposes a duty of care upon private individuals engaged in analogous activity, the FTCA does not preclude as a matter of law claims based upon recognized state-law causes of action, simply because the alleged negligence occurred in the course of conduct authorized or mandated by federal law. See 28 U.S.C. §§ 1346(b), 2674, 2680 (stating no such limitation); United Scottish, 614 F.2d at 193 ("negligent performance of a federal statutory duty may give rise to a claim under the [FTCA] in circumstances in which applicable state law recognizes a private cause of action"). In other words, if the government tortfeasor would be liable to the plaintiff for failure to exercise due care in accordance with a state-law duty if she were not a government actor, liability of the United States under the FTCA is not precluded as a matter of law simply because the tortfeasor is a government actor, carrying out a duty that devolves only upon agents of the federal government.

We conclude that the question whether an FTCA claim that is not otherwise barred by § 2680 is actionable does not turn on whether the government tortfeasor was acting under a duty imposed by federal law at the time of the negligent act or omission, or on whether the precise duties governing the conduct of federal employees ever devolve upon private individuals. Instead, the question turns on whether the applicable state law imposes upon private individuals a duty to use due care in analogous circumstances. See, e.g., Meyer, 510 U.S. at 477; Art Metal U.S.A., 753 F. 2d at 1158; Blessing, 447 F. Supp. at 1186 n.37.[19]

In the end, the government's "rooted in federal law" argument does little more than state the statutory truism that, under the FTCA, the question of negligence is to be determined under state law as applied to private individuals. As legal justification for exonerating the government from liability that would otherwise be imposed under the applicable state law, the argument goes nowhere; no such immunizing principle appears in the text of the FTCA, and none of the cited cases stands for the proposition that an FTCA claim alleging negligence on the part of a government employee for breach of a duty that is imposed upon private individuals under the applicable state law must fail, simply because the alleged negligence occurred in the course of conduct authorized or mandated by federal law.

---

[19] As we have previously stated, see Sea Air Shuttle Corp. v. United States, 112 F.3d 532, 537 n.11 (1st Cir. 1997), we agree with courts that have held that FTCA claimants may not ground liability on a state-law negligence per se theory without first establishing the existence of a duty of care under the applicable state law. As these courts point out, the doctrine of negligence per se, where applicable, defines only the standard of care required of those upon whom state law imposes a duty; it is not determinative of the existence vel non of a duty. See Myers, 17 F.3d at 899 & n.10; Art Metal-U.S.A., 753 F.2d at 1159 n.15.

2.

Framing the argument slightly differently, the government contends that the failure of OSHA compliance officers to follow a mandatory OSHA directive "is not supported by or analogous to any duty owed by a private citizen on which liability can be based." This variation of the argument raises the question whether the analogous private liability language of §§ 1346(b) and 2674 conditions the FTCA's waiver of sovereign immunity upon the degree to which the activity undertaken by a government actor resembles an activity that may be undertaken by a private actor. To the extent that the government argues that the FTCA must be read as permitting liability to be imposed upon the United States only to the extent that a private individual engaged in identical activity would incur liability under state law, the argument is unavailing. We conclude that, where Congress has not immunized the challenged conduct under § 2680, courts may not, consistent with the plain language of the FTCA and Supreme Court precedent interpreting that language, absolve the United States from liability that would otherwise attach under state tort law, solely because the tortfeasor undertook the conduct for a "uniquely governmental" purpose.

In Indian Towing, 350 U.S. 61, the plaintiffs sued the United States for the negligence of the Coast Guard in, inter alia, inspecting and maintaining the light in a lighthouse it had undertaken to operate. In this case, the government conceded that the discretionary function exception did not apply, arguing instead that "uniquely governmental functions" were exempted from the scope of the FTCA's waiver of sovereign immunity.

In explicitly rejecting the government's argument that the language of § 2674, imposing liability upon the government "'in the same manner and to the same extent as a private individual under like circumstances . . .' must be read as excluding liability in the performance of activities which

private persons do not perform," 350 U.S. at 64, the court explained,

> The Government reads the statute as if it imposed liability to the same extent as would be imposed on a private individual "under the same circumstances." But the statutory language is "under like circumstances," and it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his "good Samaritan" task in a careful manner.

Id. at 64-65. In the Court's view, "we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance -- the presence or absence of identical private activity." Id. at 67 (footnote omitted). The Court also explicitly rejected a reading of the FTCA that would impose liability upon the federal government "in the same manner as if it were a municipal corporation and not as if it were a private person," a reading that would "push the courts into the 'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations." Id. at 65.

In United States v. Union Trust Co., 350 U.S. 907 (1955), the Court, citing Indian Towing, summarily affirmed a decision of the District of Columbia Circuit permitting an FTCA suit by the survivors of airplane crash victims alleging the negligence of air traffic controllers as the cause of the collision. In so doing, the Court rejected the government's argument that "governmental functions" were excluded from liability under the FTCA, and that § 2680(a) was "'but one aspect of the broader exclusion from the statute of claims based upon the performance of acts of a uniquely governmental nature.'" Varig Airlines, 467 U.S. at 812 (quoting the government's petition for certiorari in Union Trust at 37).

In Rayonier, 352 U.S. 315, the Court held that the lower courts had erred in deciding on the basis of Dalehite that the

United States could not be sued under the FTCA for the negligence of the Forest Service in fighting a fire on government land because the plain meaning of §§ 1346(b) and 2674 made the United States liable to the petitioners if, as alleged, "Washington law would impose liability on private persons or corporations under similar circumstances." 352 U.S. at 318.

Refusing to distinguish between "the Government's negligence when it acts in a 'proprietary' capacity and its negligence when it acts in a 'uniquely governmental' capacity," the Court rejected the government's argument that the FTCA "only imposes liability on the United States under circumstances where governmental bodies have traditionally been responsible for the misconduct of their employees," and does not waive the immunity of the United States from liability for the negligence of its employees when they act in a uniquely governmental capacity. Id. at 318-19. Reasoning that "the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability," id. at 319, the Court concluded, "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it," id. at 320 (footnote omitted).

Similarly, in Muniz, 374 U.S. 150, in which the court considered the question whether state-law decisions holding state governments immune from liability for negligence in the care or protection of prisoners would also preclude federal government liability under the FTCA, the Court stated, "Just as we refused to import the 'casuistries of municipal liability for torts' in Indian Towing, so we think it improper to limit suits by federal prisoners because of restrictive state rules of immunity. Whether a discretionary function is involved is a matter to be decided under 28 U.S.C. § 2680(a), rather than under state rules relating to political, judicial, quasi-judicial, and ministerial functions." 374 U.S. at 164. See Indian

Towing, 350 U.S. at 65 (the FTCA "cuts the ground from under" the doctrine of sovereign immunity, and "is not self-defeating by covertly embedding the casuistries of municipal liability for torts") (footnote omitted); Schindler, 661 F.2d at 560 (it is "self-defeating and illogical to hold that the United States may have waived its immunity with regard to a particular act because it is not a discretionary function, and then turn to the law of the state and incorporate the means by which it has chosen to solve this same problem of preserving" governmental immunity). See also Carter v. United States, 982 F.2d 1141, 1143 (7th Cir. 1992) ("when a state distinguishes private from public liability, the liability of the United States follows the private model"); DiMella v. Gray Lines of Boston, Inc., 836 F.2d 718, 720 (1st Cir. 1988) (whatever liability the state may have chosen to assume for itself has no bearing on the liability of private persons, the standard the United States has accepted).

We conclude that, standing alone, a tortfeasor's uniquely governmental purpose in undertaking to act is insufficient to remove the challenged conduct from the scope of the FTCA's waiver of sovereign immunity, and that -the pertinent inquiry under §§ 1346(b) and 2674 is whether state law makes a private individual (not the state or other political entity) liable for the asserted failure to exercise due care under similar (not identical) circumstances. See also Guttridge v. United States, 927 F.2d 730, 734 (2d Cir. 1991) (when the United States is sued under the FTCA, "it stands in the shoes of a private citizen"); Goldman v. United States, 790 F.2d 181, 183 & n.1 (1st Cir. 1986).

Notwithstanding the Supreme Court's unequivocal and repeated rejection of defenses to FTCA liability based upon a purported general statutory immunity for uniquely governmental functions, and upon local rules limiting the liability of government actors -- to say nothing of the complete lack of textual support for such defenses -- lower courts have barred FTCA claims on the basis of state-law rules of immunity for government actors, see, e.g, Ayala v.

United States, 49 F.3d 607 (10th Cir. 1995), and the government has continued to press the uniquely governmental function defense, in one semantic variation or another.

In Varig Airlines, for example, the government argued that "the conduct of the FAA in certificating aircraft is a core governmental activity that is not actionable under the Act, because no private individual engages in analogous activity," and that the Ninth Circuit erred in applying California's Good Samaritan doctrine to the FAA certification process. 467 U.S. at 815 n.12. Because the Court rested its decision on the discretionary function exception, it found it unnecessary to address the first argument. Importantly, however, the Court stated that it declined the government's invitation to undertake its own examination of the Good Samaritan claim because "the application of the 'Good Samaritan' doctrine is at bottom a question of state law, and we generally accord great deference to the interpretation and application of state law by the Courts of Appeals." 467 U.S. at 815 n.12 (citations omitted).

And as recently as the Berkovitz decision, the Court observed that the government's argument that Congress intended to preserve immunity for core governmental functions, and that the discretionary function exception "precludes liability for any and all acts arising out of the regulatory programs of federal agencies," was a variant of the uniquely governmental function defense which "appears to replicate precisely the position expressly rejected in Indian Towing and Rayonier." 486 U.S. at 538-39 & n. 5. See United States v. Johnson, 481 U.S. 681, 694-95 (1987) (Scalia, J., dissenting).

Given that the FTCA expressly subjects the United States to liability if state law would impose liability upon a private individual under like circumstances, and in view of the Supreme Court's unequivocal interpretation of the FTCA's analogous private liability language, it simply cannot be maintained that the FTCA bars claims as a matter of law for lack of identity between activities performed by government

actors and those performed by private individuals. Such a reading is contrary to Congress's intent, as expressed in the language of §§ 1346(b) and 2674, and in the existence of § 2680, which expressly exempts the uniquely governmental functions that Congress thought should be immunized. Moreover, such a reading of this language would render many of the FTCA's statutory exceptions superfluous because private parties typically do not engage in the uniquely governmental conduct exempted by most of the provisions of § 2680. See Johnson, 481 U.S. at 694 (Scalia, J., dissenting); Indian Towing, 350 U.S. at 67 (noting that FTCA liability is circumscribed by § 2680, and that "all Government activity is inescapably 'uniquely governmental' in that it is performed by the Government").[20]

---

[20] We emphasize that our analysis of the FTCA's analogous private liability requirement is limited to the question whether, in the context of a claim alleging negligence in the conduct of a federal regulatory inspection, this statutory language must be read to condition the FTCA's waiver of sovereign immunity upon identity between governmental activity mandated by federal law and private activity under state law, thereby excluding as a matter of law claims based upon conduct in which a private person could never engage.

We express no opinion as to how the analogous private liability requirement should be interpreted and applied in other contexts, such as where the plaintiff seeks to hold the United States liable under the FTCA for the intentional torts of federal law enforcement officials -- defined by the FTCA as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law" -- as permitted by a 1974 amendment to 28 U.S.C. § 2680(h). See, e.g. Hetzel v. United States, 43 F.3d 1500, 1503-04 (D.C. Cir. 1995) (looking to the standard of care applicable to a law enforcement official engaged in an authorized high-speed pursuit of a criminal suspect because no private individual has the authority to engage in a high-speed chase, and thus there is no readily available private analogue upon which to premise FTCA liability).

We note with interest that, in Hetzel, the United States argued against applying a municipal or state analogy in FTCA cases where a private analogue is absent. 43 F.3d at 1504 n. 5.

The government makes a number of arguments to the effect that liability in this case is barred by the OSH Act, contending that 29 U.S.C. § 653(b) (4)[21] precludes liability for conduct in the performance of OSHA regulatory functions; that, under the OSH Act, the responsibility for providing and maintaining a safe workplace and for complying with OSHA safety standards remains at all times with the employer, see 29 U.S.C. § 654; and that OSHA is not an insurer of workplace safety. These points are well taken. As we stated in Zabala Clemente, "We do not believe that the expanded role of the federal government in the safety area through such legislation as [the OSH Act] indicates an intent of Congress to make the United States a joint insurer of all activity subject to inspection under that statute or others." 567 F.2d at 1151. Nevertheless, we disagree with the government's conclusion that the OSH Act renders Irving's FTCA claim non-actionable.

In enacting the OSH Act, congress did not, of course, intend to make the United States a joint insurer of workplace safety. Cf. Varig Airlines, 467 U.S. at 821 ("The FAA has a statutory duty to promote safety in air transportation, not to insure it."); 29 U.S.C § 653(b)(4). If it did, it likely would have included an express private right of action, which it did not. See Blessing, 447 F. Supp. at 1166 n.5. But Irving does not assert a private right of action under the OSH Act. And, if the FTCA waives sovereign immunity in this case, there is no principle-of law that requires Irving to demonstrate a second waiver of immunity in the language of the OSH Act, or that compels this court to construe the OSH Act "in the manner appropriate to waivers of sovereign immunity." Mitchell, 463 U.S. at 218-19.

---

[21] 29 U.S.C. § 653(b)(4) provides, "Nothing in this chapter shall be construed . . . to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."

Moreover, it does not follow from the fact that the OSH Act places primary responsibility for workplace safety on employers that, as a matter of FTCA law, OSHA employees incur no duty of reasonable care under state tort law when they undertake to conduct a compliance inspection. Nor does it follow from the existence of the OSH Act that the United States is immunized from FTCA liability for the negligence of its employees in the conduct of inspections authorized by that statute. For, although the OSH Act (along with OSHA regulations, guidelines, and policies) defines the federal duties of OSHA employees in undertaking to conduct workplace safety inspections, it does not define the rights under the FTCA of persons injured by the negligence of OSHA employees in the performance of these inspections.

We agree that no FTCA action would lie against the United states if the only basis for Irving's claim was Somersworth's failure to maintain a safe workplace. But, having exercised its authority under the OSH Act to promulgate regulations and standards defining what constitutes workplace safety, and having undertaken the role of determining whether a workplace complies with those standards, OSHA and its employees are not thereby free to determine compliance in a negligent manner where the challenged act or omission is not immunized by § 2680. If New Hampshire law would impose liability upon a private individual for negligence in the conduct of a workplace safety inspection, and if Congress has not otherwise immunized the United States from liability for such conduct in § 2680, there is no statutory basis from which we may presume as a matter of law that Congress did not intend to waive sovereign immunity in these circumstances. To hold otherwise would be to subvert the clear directives of the FTCA.

Moreover, to hold that the government may not be held liable under the FTCA where its employees act pursuant to a duty prescribed by the OSH Act (or by OSHA regulations, guidelines, or policy) would have the perverse consequence of mandating that the intended beneficiaries of a remedial and

preventative statute may never recover under the FTCA if one reason for the governmental undertaking is to ensure compliance with standards that were promulgated for the very purpose of effectuating the express goals of the statute, in this case to prevent precisely the kind of workplace accident that injured Gail Irving. See Dalehite, 346 U.S. at 50 ("The Government, as a defendant, can exert an unctuous persuasiveness because it can clothe official carelessness with a public interest. Hence, one of the unanticipated consequences of the [FTCA] has been to throw the weight of government influence on the side of lax standards of care in the negligence cases which it defends.") (Jackson, J., dissenting).

Imposing liability upon the government under circumstances in which the FTCA permits it hardly equates with making the United States a joint insurer of every activity subject to government involvement. Furthermore, as the district court pointed out, the applicable law would preclude the vast majority of suits based upon negligence in the conduct of federal regulatory inspections. Under these circumstances, we do not think that an adverse effect upon the ability of regulatory agencies to conduct their respective regulatory functions is "so certain, or so certainly substantial, that we are justified in holding (if we can ever be justified in holding) that Congress did not mean what it plainly said in the statute before us," Johnson, 481 U.S. at 699 (Scalia, J., dissenting), and "[w]e also are reluctant to believe that the possible abuses stemming from [similar] suits are so serious that all chance of recovery should be denied," Muniz, 374 U.S. at 162.

4.

We recognize that other courts have barred FTCA claims based upon conduct in the course of regulatory inspections where the statute that authorizes the inspection stipulates that the employer retains responsibility for complying with safety standards. See, e. g., Myers, 17 F 3d at 903; Taylor v. United

States, 521 F. Supp. 185, 188-89 (W.D. Ky. 1981); Mercer v. United States, 460 F. Supp. 329, 332 (S.D. Ohio 1978). We also recognize that, despite the Supreme Court's refusal to read either § 2680(a) or the analogous private liability requirement of §§ 1346(b) and 2674 as providing a blanket immunity for regulatory and other uniquely governmental functions, the interpretation of the FTCA's analogous private liability provision is not without conceptual difficulty in the context of a claim alleging negligence in the conduct of a federal regulatory enforcement inspection, for which there is no identical private analogue.

Some courts have distinguished Indian Towing and Rayonier, limiting the applicability of these cases to circumstances in which the government undertakes to act pursuant to a contractual obligation, or where the government has assumed exclusive proprietary control. See Davis, 395 F. Supp. at 796-97. See also Myers, 17 F.3d at 904 (employing an "actor/monitor dichotomy" to distinguish between actionable and non-actionable negligence under the FTCA); cf. Dube, 870 F.2d at 799 n.11; Jayvee Brand Inc. v. United States, 721 F.2d 385, 390 (D.C. Cir. 1983).

But the Supreme Court has drawn no such distinctions, and clearly has not conditioned FTCA liability upon the degree to which the governmental activity at issue resembles an activity in which private individuals may engage. As Judge Easterbrook has explained, the federal government "is never situated identically to private parties. Our task is to find a fitting analog under private law. Thus the United states may be liable for negligence in carrying out acts that no private person performs, because there are 'like' circumstances that lead to private liability." Carter, 982 F.2d at 1144. Indeed, in Muniz, rather than look for private activity analogous to the uniquely governmental activity of running a federal prison, the Supreme Court found the analogous private liability requirement to be satisfied by the existence of "an analogous form of liability"; viz., that a number of states allowed prisoners to recover from their jailers for negligently caused

injuries, and some permitted such recovery against themselves. 374 U.S. at 159-60 (emphasis supplied). In short, the terms of the United States' consent to suit under the FTCA may be satisfied where there is an analogous form of liability, even where there is no precise private analogue for the governmental activity itself. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 131, at 1035 n.33 (5th ed. 1984) ("The private person analogy is read broadly and it is not necessary to find that private persons carry on the activity in question.").

It is also important to recognize that the Good Samaritan cause of action was well established at the time Congress enacted the FTCA. See D. Scott Barash, Comment, The Discretionary Function Exception and Mandatory Regulations, 54 U. Chi. L. Rev. 1300, 1310-11 (1987); Neustadt, 696 U.S. at 707. Moreover, although the Supreme Court has had ample opportunity to reject the Good Samaritan doctrine as a basis for imposing liability under the FTCA, it has not done so, see Sheridan v. United States, 487 U.S. 392 (1988); Indian Towing, 350 U.S. 61, even in the context of regulatory activities, see Berkovitz, 486 U.S. 531; Varig Airlines, 467 U.S. 797; Block v. Neal, 460 U.S. 289 (1983). To the contrary, the Court has recognized that an FTCA claim is stated where the applicable state law would subject a private individual to Good Samaritan liability, see Neal, 460 U.S. at 297-99, and has explicitly stated that the application of the doctrine is purely a matter of state law, see Varig Airlines, 467 U. S. at 815 n. 12.

It is also worth noting that Congress has left Indian Towing undisturbed, despite taking action to limit the FTCA liability of the United States in other contexts. See Pub. L. 100-694 § 4, 102 Stat. 4564 (1988) (amendment to the FTCA in response to the Supreme Court's decision in Westfall v. Erwin, 484 U.S. 292 (1988), adding language entitling the United States to assert, with respect to any claim arising from the tortious conduct of a government employee, "any defense based upon judicial or legislative immunity which otherwise

would have been available to the employee . . . as well as any other defense to which the United States is entitled").

In sum, we do not read the FTCA as conditioning the scope of the waiver of sovereign immunity under §§ 1346 (b) and 2674 on the basis of distinctions between "governmental activity" and "private activity," and as exonerating the United States from liability as a matter of law where it would otherwise be imposed under the applicable state law, unless a private person could engage in the precise conduct at issue for the precise reason that the government engaged in it. There is no evidence that Congress intended such a reading, and it is abundantly clear that the Supreme Court has rejected this interpretation. Instead, we think that, in §§ 1346(b) and 2674, the FTCA delimits the scope of the waiver on the basis of whether or not a claim would lie against a private individual (rather than a state actor) under the applicable state law (rather than under federal law), and directs that liability be imposed if, under state law, it would be imposed if the government actor were a private actor. See, e.g., Meyer, 510 U.S. at 477-78.

We conclude that the limiting principles shielding the United States from liability for the uniquely governmental functions that Congress sought to protect are contained in § 2680, and that there is no basis in positive law for reading into §§ 1346(b) and 2674 a broad and general immunity for uniquely governmental functions that Congress itself has not enacted and that the Supreme Court has expressly rejected. See Dalehite, 346 U.S. at 32 ("One only need read § 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions."). See also United States v. Yellow Cab Co., 340 U.S. 543, 548 n.5 (1951) ("Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule [of strict construction] cannot be had in order to enlarge the exceptions.") (quotation omitted) (alteration in Yellow Cab).

Whatever the wisdom of a blanket exemption for regulatory activities, "its conversion into law is a proper subject for congressional action, not for any creative power of ours." United States v. Standard Oil Co. of Cal., 332 U.S. 301, 314 (1947). See Rayonier, 352 U.S. at 320; Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1183 (1989) ("Even where a particular area is quite susceptible of clear and definite rules, we judges cannot create them out of whole cloth, but must find some basis for them in the text that Congress or the Constitution has provided."); Caminetti v. United States, 242 U. S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."). In short, we have no authority to bar a claim that Congress, the United States Supreme Court, and the Supreme Court of New Hampshire would permit.

IV.

A.

Having determined that Irving's FTCA claim is not barred as a matter of federal law, we now consider whether the district court correctly determined that, under New Hampshire law, the United States is liable for Irving's injuries.

Under New Hampshire law, a plaintiff seeking to recover for negligence on the part of the defendant must prove the familiar elements of duty, breach, injury, and causation. See, e.g., Ronayne v. State, 632 A.2d 1210, 1212 (N.H. 1993). Here, Irving invokes as the source of the duty element of her negligence claim the Good Samaritan theory of liability, as it has been interpreted and applied under New Hampshire law.

Under the Good Samaritan doctrine as formulated in § 324A of the Restatement, in certain circumstances, liability may be imposed upon "[o]ne who undertakes, gratuitously or

for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things . . . ." The government argues that Irving's claim fails as a matter of law because the United States does not "render services" when it undertakes to conduct regulatory enforcement inspections.

While the "rendition of services" issue has generated controversy in the lower federal courts, the district judge in this case resolved the matter without difficulty. On the basis of the evidence and the law, he rejected the government's contention that "the 'punitive' nature of the inspection process requires a finding that the 1975 and 1978 inspections were not 'services' within the meaning of New Hampshire's Good Samaritan doctrine" on the following grounds: (i) the argument ignored the weight of the evidence;[22] (ii) the reason for undertaking the inspection is not controlling under the Good Samaritan doctrine; and (iii) the argument is tantamount to a suggestion that the government may avoid FTCA liability for uniquely governmental functions. 942 F. Supp. at 1504 n.26.

Still, the argument that no Good Samaritan duty attaches when the government undertakes to conduct regulatory inspections finds ample support in the decisional law of other courts. A number of cases have held that the United States may not be held liable under the Good Samaritan doctrine to the employees of its independent contractors for the negligent performance of an inspection authorized by a federal statute, on the ground that such an inspection does not constitute a "rendition of services" for the benefit of either the contractor or its employees. See, e.g., Jeffries v. United States, 477 F.2d

---

[22] The court considered, for example, Area Director Amirault's testimony that "[t]he purpose of my agency . . . is to identify and document the hazards and to provide assistance to employers in meeting their obligations," and that the purpose of a wall-to-wall safety inspection is "to assist the company in getting into compliance and complying with the law which requires them to be in compliance."

52, 56 (9th Cir. 1973); Beason v. United States, 396 F.2d 2 (5th Cir. 1968); Roberson v. United States, 382 F.2d 714, 721-22 (9th Cir. 1967). Other decisions have employed similar reasoning in rejecting FTCA claims based upon negligence in the conduct of federal regulatory inspections. See Myers, 17 F.3d at 901; Trombetta v. United States, 613 F. Supp. 169, 169-70 (D. Mont. 1985); Taylor, 521 F. Supp. at 188-89; McCreary v. United States, 488 F. Supp. 538, 540 (W.D. Pa. 1980); Mercer, 460 F. Supp. at 332. See also Florida Auto Auction of Orlando Inc. v. United States, 74 F.3d 498, 504-05 (4th Cir. 1996).

These decisions focus on the government's purpose in undertaking the inspection, and conclude that there is a material difference between inspections conducted pursuant to a statute and inspections undertaken pursuant to other legal authority, such as a contractual agreement; or that, because the government engages in regulatory activities for independent reasons -- e.g., to promote public safety or to ensure compliance with federal laws -- such undertakings do not constitute a rendition of services as contemplated by the Restatement's formulation of Good Samaritan liability. As the Taylor court put it, "comparison of private tort duties with an attempt by the government to carry out a health and safety regulatory function is similar to apples and oranges. Succinctly stated, there is none." 521 F. Supp. at 189. Thus, any analogy between sections 323 and 324A of the Restatement and a federal regulatory scheme is "simply invalid." Id. at 190.

Other courts disagree with this reasoning. See United Scottish Ins. v. United States, 692 F.2d 1209, 1211 (9th Cir. 1982) ("When voluntarily performing activities solely for the safety of the public, the F.A.A. performs a service for others."), rev'd on other grounds, United States v. Varig Airlines, 467 U.S. 797 (1984); Varig Airlines v. United States, 692 F.2d 1205, 1208 (9th Cir. 1982) ("The voluntary assumption of the inspection and certification function carries with it the duty to inspect and certify with reasonable care."),

reved on other grounds, United States v. Varig Airlines, 467 U.S. 797 (1984); Raymer v. United States, 660 F.2d 1136, 1143-44 (6th Cir. 1981) (concluding that "the United States has undertaken to render services to others in adopting the [Federal Coal Mine Health and Safety Act of 1969], and that cases of this kind are properly resolved by applying the 'good Samaritan doctrine' as the Supreme Court did in Indian Towing"); Neal v. Bergland, 646 F.2d 1178, 1181-82 (6th Cir. 1981) (concluding that the FMHA had assumed a duty to inspect and supervise construction projects and could be held liable for breach of that duty in a state-law tort action for negligent inspection, based upon the Good Samaritan doctrine);[23] Kirk, 604 F. Supp. at 1482 (same as Neal v. Bergland). Cf. Sheridan, 487 U.S. at 401 (by voluntarily adopting regulations and undertaking to provide care, "the Government assumed responsibility to 'perform [its] "good Samaritan" task in a careful manner'") (quoting Indian Towing, 350 U.S. at 65) (alteration in Sheridan).

While, as explained below, we need not decide the issue for purposes of this case, we think that the better view is reflected in these latter cases. First, from the fact that the government intends to further its own or certain societal goals in undertaking to conduct regulatory inspections, it does not follow that the government does not also intend to confer a benefit upon those subject to regulation and inspection, or upon those whose welfare Congress had in mind in enacting the legislation that authorizes the inspection. In enacting the OSH Act, Congress expressly intended to benefit workers like Gail Irving, by mandating that OSHA promulgate workplace safety standards and ensure compliance with those standards.

---

[23] The Supreme Court affirmed the Sixth Circuit's decision in Neal v. Bergland on other grounds. See Block v. Neal, 460 U.S. 289 (1983). The Court did not review the Good Samaritan claim because the government argued only that the plaintiff's claim was barred by 28 U.S.C. § 2680(h), the misrepresentation exception.

Second, we agree with the district court that to argue that the United States is immune from Good Samaritan liability under the FTCA because the government does not undertake to render services when it conducts regulatory inspections is tantamount to arguing that the United States is immune from FTCA liability where its employees undertake to act for a uniquely governmental purpose; and, as we have shown, it is inappropriate to bar a viable state-law claim on the basis of the defendant's sovereign status simpliciter.

Moreover, we think it clear that the question whether the tortfeasor has rendered a service -- and, indeed, the question whether a "rendition of services" is, in fact, an element of a negligence claim premised upon a Good Samaritan theory of liability -- is to be resolved under state law as it applies to private individuals, and not as a matter of federal common law. See, e.g., Birnbaum, 588 F.2d at 327-28; Goldman, 790 F.2d at 183 (interpreting 28 U.S.C. §§ 1346(b), 2674 to require that the applicable state law must be applied in deciding the manner and extent to which a private person would be liable, and analyzing duty under state law). Accordingly, the relevant question is not whether the federal statute that authorizes the governmental undertaking creates a duty which is analogous to an undertaking to render services to another as contemplated by the Restatement's formulation of the Good Samaritan doctrine, but whether, under the applicable state law, a private person would incur a legal duty of care pursuant to that state's interpretation of the Good Samaritan theory of liability. See Varig Airlines, 467 U.S. at 815 n.12 ("the application of the 'Good Samaritan' doctrine is at bottom a question of state law"); United Scottish, 614 F.2d at 193-94 ("The reason for undertaking the inspection is not important. . . . The crucial inquiry is whether, in undertaking the inspection, a duty arose under state law because of the relationship thereby created -- the good samaritan rule."); Blessing, 447 F. Supp. at 1186 n.37.

We think that, in this case, the "rendition of services" issue is obviated by New Hampshire's interpretation and

application of the Good Samaritan doctrine; for in cases presenting the question whether one who undertakes to act voluntarily incurs a duty to exercise reasonable care in the undertaking, the Supreme Court of New Hampshire applies the doctrine in a less formalistic manner than appears to be mandated by some courts' interpretations § 324A of the Restatement. See, e.g., Williams v. O'Brien, 669 A.2d 810, 813 (N.H. 1995); Corson, 265 A.2d at 318 (collecting cases).

B.

1.

The liability principle outlined in §§ 323 and 324A of the Restatement represents an application of Judge Cardozo's classic statement, "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." Glanzer v. Shepard, 135 N.E. 275, 276 (N.Y. 1922). This principle is well established in New Hampshire tort law. See, e.g., Corson, 265 A.2d at 318 (collecting cases). As the district court correctly noted, however, in applying this principle, the Supreme Court of New Hampshire does not rely upon the precise formulation explicated in the Restatement, and, to the extent that the two authorities differ, New Hampshire's interpretation controls the analysis of the government's liability in this case. See 942 F. Supp. at 1503 n.24.

We find that, while the Supreme Court of New Hampshire has consistently upheld "the broad and sensible principle running throughout our tort law that one who undertakes to act must use ordinary care," it has emphasized that "[i]t is the fact of the parties[']relationship and not the manner in which it arises which is decisive," and that "'[t]he duty to use care in rendering a service arises not from a right to receive the service, but from the relation between the parties which the service makes.'" Brunelle, 64 A.2d at 318 (quoting Tullgren v. Amoskeag Mfg. Co., 133 A. 4, 5 (N.H.

1926), and collecting cases). See Smith 163 A.2d at 567. And, whereas the Restatement formulation ensures that the injured third party is a reasonably foreseeable plaintiff by requiring proof of one of the three disjunctive elements of § 324A,[24] New Hampshire law ensures foreseeability by requiring that the plaintiff fall within the "orbit of risk" created by the defendant's negligence. See Corson, 265 A.2d at 318; Smith, 163 A.2d at 567 ("it is a basic principle of our jurisprudence that one who undertakes to act, even gratuitously, may be liable to persons injured by his failure to use due care," and this liability "extends to all who may fairly be said to come within the orbit of risk created by the actor's negligence"). See also Corso v. Merrill, 406 A.2d 300, 303 (N.H. 1979) ("Duty and foreseeability are inextricably bound together. 'The risk reasonably to be perceived defines the duty to be obeyed.'") (quoting Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y. 1928)); Derby v. Public Serv. Co. of N.H., 119 A.2d 335, 340 (N.H. 1955). Finally, in imposing a duty upon those who undertake to act voluntarily, New Hampshire has rejected pleas by defendants to bar as a matter of law a plaintiff's common-law right against a defendant, based upon the defendant's identity, see Smith, 163 A.2d at 567; Brunelle, 64 A.2d at 318, and has rejected contrary authority from other jurisdictions in imposing tort liability, see Smith, 163 A.2d at 567.

"Whether a duty exists in a particular case is a question of law." Walls v. Oxford Management Co., 633 A.2d 103, 104 (N.H. 1993). As we read New Hampshire law, the existence vel non of a duty under a Good Samaritan theory does not turn on formalisms such as the precise definition of "rendering services." Instead, the Good Samaritan duty arises

---

[24] Under § 324A, liability may be imposed if one of the following three alternative elements is established: "(a) [the actor's] failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

as a result of the relationship between the parties that is created by the undertaking, and is independent of the identity of the actor and of the particular reason for the undertaking. See Brunelle, 64 A.2d at 318; Smith, 163 A.2d at 567, 570. See also Mehigan v. Sheehan, 51 A.2d 632, 633 (N.H. 1947).

In Corson, the Supreme Court of New Hampshire answered in the affirmative the question whether a company that "undertakes to assist accident prevention by additional inspections and advice rendered to the company primarily charged with the duty" can be liable to an injured employee for negligence in the conduct of a workplace safety inspection. 265 A.2d at 317. The court found that the relationship between the inspecting and inspected companies gave rise to a duty on the part of the inspecting company to use due care in the performance of a safety inspection, and considered it to be "beyond debate" that if the inspector was under a legal duty to use due care in the undertaking, "that duty extended to [the injured employee] who was clearly within the orbit of risk which would be created by negligent performance of the duty. " Id. at 318.[25]

In the instant case, the district court concluded that it was reasonably foreseeable that Somersworth would not guard the

---

[25] The parties describe Corson as having been abrogated by an amendment to the New Hampshire workers' compensation statute that bars actions by employees against workers' compensation insurance carriers. See N.H. Rev. Stat. Ann., § 281:12-I (1987) (recodified after 1988 repeal and re-enactment at § 281-A:8-I) (Supp. 1996). We do not find the amendment to be material to the disposition of this case. Corson's determination of liability was based upon common-law duty principles of long standing in New Hampshire law, and liability was imposed notwithstanding that there, as here, the employer, and not the inspecting entity, retained primary responsibility for workplace safety. See Corson, 265 A.2d at 317-19. That the New Hampshire legislature has chosen to further the purposes of its workers' compensation laws by immunizing compensation carriers from liability to workers by no means compels the conclusion that New Hampshire law would immunize all private workplace safety inspectors, or that New Hampshire would not impose a duty of care upon a private individual in the circumstances presented here.

die-out motor drive shaft absent notice of a violation from OSHA, and that serious injury could result from this violative condition. 942 F. Supp. at 1508-09. We agree. At the time of the 1975 and 1978 inspections, it was reasonably foreseeable that an uninspected operational machine might be in a condition that violated OSHA safety standards, and that the violative condition posed a risk of serious harm. It was also reasonably foreseeable that such a violation, if not cited by OSHA, would go unabated; that the risk of harm presented by such a violation, if unabated, would lead to a serious injury of the type actually suffered by Irving; and that a facility such as the Somersworth plant, which had no safety department or trained safety personnel, would depend upon OSHA safety inspections to inform the employer and employees of violations of OSHA safety standards.

The district court held that the government's duty to exercise due care extended to Irving for the same reason it extended to the plaintiff in Corson. See 942 F. Supp. at 1504. In Corson the court concluded,

> The issues presented may be aptly described in the language of Cardozo, Ch. J., in Marks v. Nambil Realty Co. Inc., 245 N.Y. 256, 259, 157 N.E. 129, 130: "His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right . . . The inference is permissible that the [defendant's conduct] cloaked the defect, dulled the call to vigilance, and so aggravated the danger."

265 A.2d at 318-19 (alteration in Corson). See also Smith, 163 A.2d at 567 (holding that the liability of the defendant workplace inspector extended to the injured plaintiff employee, who "falls squarely within the class entitled to protection").

Based upon the evidence -- including evidence that employees of Somersworth and Wood Heel (another shoe company within the same building) were aware of the

existence, purpose, and scope of OSHA inspections, and that their employers were required to abate cited violations -- the district court determined that "the inference that negligence on the part of OSHA in performing its inspections increased the risk of harm to Somersworth Shoe employees by dulling their vigilance regarding workplace hazards is a valid one"; that the compliance officers "did, in fact, negligently make matters worse"; and that Irving was a foreseeable plaintiff to whom OSHA owed a duty of care. See 942 F. Supp. at 1504 (internal quotation marks and citation omitted).[26]

Although Corson did not discuss § 324A(c)'s alternative element of reliance, the district court also found that the duty of the OSHA compliance officers extended to Irving because Somersworth had reasonably relied upon OSHA inspections to inform the company of the existence of violations of OSHA safety standards, and to perform compliance inspections in a non-negligent manner. 942 F. Supp. at 1504.

In addition to finding that Somersworth and Wood Heel employees were aware of the OSHA inspections, the district court found that unrebutted testimony established that Somersworth "'actually depend[ed]' on the OSHA inspections to find safety problems that the company had

---

[26] Although many courts have interpreted the "increasing the risk" alternative element of § 324A(a) as requiring an affirmative act on the part of the defendant that increases the risk in a material way, beyond merely permitting an unsafe condition to continue, see Myers, 17 F.3d at 902-03; Howell v. United States, 932 F.2d 915, 918-19 (11th Cir. 1991); Patentas v. United States, 687 F.2d 707, 716-17 (3d Cir. 1982); Raymer, 660 F.2d at 1143; Zabala Clemente, 567 F.2d at 1145, the district court did not err in failing to apply the more stringent standard, as the Supreme Court of New Hampshire clearly found liability in Corson absent such a requirement. See also New England Tel. & Tel. Co. v. Reed, 336 F.2d 90, 95 (1st Cir. 1964) (explaining that two separate and distinct acts of negligence may each be regarded as the proximate cause of injury, and if one defendant had allowed a "negligent condition to continue to exist, the fact that it might not have been able to foresee the exact manner in which the injury might occur affords it no defense") (applying New Hampshire law).

overlooked." Id. (quoting testimony of Roger Couture, foreman of the Somersworth stock fitting room).

The court rejected the government's argument that, even if Somersworth did rely, its reliance was not reasonable because, under the OSH Act, primary responsibility for compliance with OSHA safety standards remained with Somersworth and its employees. Stating that this was the reason for his finding that OSHA did not undertake to perform a duty owed by Somersworth to its employees as contemplated by Restatement § 324A(b), the district judge concluded that the fact that Somersworth retained a statutory duty to comply with OSHA standards "does not mean that it could not reasonably expect OSHA compliance officers to use due care when they acted to assist it in meeting its obligations under the Act." The court pointed out that, in Corson, "the inspecting company owed the inspected company a duty to use due care despite the fact that the inspected company retained primary responsibility for preventing workplace accidents." 942 F. Supp. at 1504-05 n.27 (citing Corson, 265 A.2d at 317-18).

The government argues that Somersworth could not reasonably rely upon OSHA's unannounced inspections, the occurrence and frequency of which it is impossible to predict. We reject this argument. The record shows that, in 1975 and 1978, the compliance officers toured the stock fitting room, where the marker/die-out bench assembly was located on a main aisle, and that the officers documented similar violative conditions of drive shafts elsewhere in the plant, which Somersworth timely abated in accordance with the terms of the citations that were issued for those violations. While it may be unreasonable to rely upon OSHA inspections that may or may not occur in the future, we think that, on these facts, it was reasonable for Somersworth and its employees to rely upon the pre-accident inspections that did take place in relatively close proximity to the accident, and to rely upon OSHA's failure to document the violative condition of the

die-out motor drive shaft as indicating that, unlike other drive shafts in the plant, it was not in a violative condition.

We are aware that some courts have narrowly interpreted the "reliance" element of § 324A(c) as requiring proof that the plaintiff employee or her employer [27] depended exclusively upon the federal safety inspection, foregoing all other remedies or precautions, and that some cases hold that reliance is unreasonable as a matter of law where the authorizing statute or regulation provides that the employer retains the burden of compliance. See Myers, 17 F.3d at 903-04; Patentas v. United States, 687 F.2d 707, 717 (3d Cir. 1982); Raymer, 660 F.2d at 1143-44. This interpretation suggests that the reliance element of §324A(c) is not satisfied absent proof sufficient to satisfy § 324A(a), the alternative element that is established where the defendant has completely assumed the duty owed by another to the plaintiff, which the district court found and Irving concedes does not apply here.

Whatever the merits of this view of § 324A(c), we do not think that it controls the analysis here. New Hampshire law construes Good Samaritan liability more broadly than does the Restatement, predicating duty upon foreseeable harm to one within the orbit of risk posed by the actor's negligence, rather than upon exclusive reliance, and nothing in the case law suggests to us that New Hampshire would require proof of exclusive reliance in the circumstances presented here. See Spherex, Inc. v. Alexander Grant & Co., 451 A.2d 1308, 1313 (N.H. 1982) (liability of defendants is dependent upon their undertaking; "[t]hey cannot escape liability for negligence by a general statement that they disclaim . . . reliability") (internal quotation marks and citations omitted); Derby, 119

---

[27] The government also contends that the record is barren of evidence that Irving herself relied upon the OSHA inspections and that this is fatal to her claim. But, in the liability-to-third-parties version of the doctrine, reliance is established if either Somersworth or its employees relied. See Restatement § 324A(c).

A.2d at 340 (plaintiffs who come within the orbit of risk created by the defendant's negligence are owed a duty by the defendant); Williams, 669 A.2d at 813 (New Hampshire recognizes "that a defendant may be liable to third parties for a foreseeable harm resulting from the breach of a duty of care"). See also Canipe v. National Loss Control Serv. Corp., 736 F.2d 1055, 1063 (5th Cir. 1984) (holding that an employer's partial reliance upon the defendant's undertaking is sufficient to trigger 324A(c)); United Scottish, 692 F.2d at 1211 (explaining that, "[h]aving chosen to make aircraft safety inspections and to certify the results, the government reasonably could expect that members of the public would rely on the government's certification of airworthiness," and that "[t]he careful performance of aircraft inspections is the essence of the government's duty, once the inspections are undertaken").

We find no error in the district court's findings of fact or in its application of New Hampshire law, and therefore we affirm the court's ruling that, under New Hampshire law, the government incurred a duty of care that extended to Gail Irving -- a foreseeable plaintiff within the orbit of risk created by the negligence of the OSHA compliance officers -- when it undertook to conduct wall-to-wall safety inspections of the Somersworth plant in 1975 and 1978.

2.

Having determined that the government owed a duty of care to Irving, the district court went on to hold that the government breached this duty. The scope of the duty is defined by the extent of the undertaking, see Walls, 633 A.2d at 660; Blessing, 447 F. Supp. at 1189, and "[t]he test of due care is what reasonable prudence would require under similar circumstances," Weldy v. Town of Kingston, 514 A.2d 1257, 1260 (N.H. 1986). Although we do not here consider the doctrine of negligence per se, we do note that, under New Hampshire law, a violation of rules may be considered as evidence of negligence. See Murray, 224 A.2d at 69-71

(explaining that the promulgation of rules is evidence of the reasonable necessity for the rules and that violation of a rule may be used as evidence of negligence).

Here, in addition to the testimonial evidence of the standard of care set by OSHA for the conduct of wall-to-wall safety inspections, the record contains the OSHA Field Operations Manual for 1981, which states that a compliance officer's "primary responsibility is the conduct of effective inspections to determine whether employers are: (1) complying with safety . . . standards and regulations . . . and (2) furnishing places of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to their employees." Field Operations Manual at V-1.[28] The district court held that a reasonably prudent inspector of workplace safety hazards in the circumstances presented here would have inspected the marker/die-out bench assembly during the 1975 and 1978 inspections, concluding from the facts that the failure of the compliance officers to inspect the bench assembly could only be explained by their failure to exercise due care in conducting the wall-to-wall inspections of the Somersworth plant. 942 F. Supp. at 1505.

We uphold the district court's finding that the government breached its duty of care to Irving. We add that breach would be established under New Hampshire law, even if there were no mandatory OSHA policy requiring that all operational machines be inspected during a wall-to-wall safety inspection, because reasonable prudence would require this standard of care in the circumstances presented here. See Weldy, 514 A.2d at 1260.

---

[28] As we noted in the second appeal, the manual in evidence indicates that it contains revised language, but no indication of the significance of the revisions or how the version(s) in use in 1975 and 1978 read. See 909 F 2d at 604 n. 5.

3.

Under New Hampshire law, the defendant's negligent conduct is the legal or proximate cause of the plaintiff's injuries if the conduct is "'a substantial factor in bringing about the harm.' " Weldy, 514 A.2d at 1261 (quoting Maxfield v. Maxfield, 151 A.2d 226, 230 (N.H. 1959)). The substantial factor inquiry requires a determination of whether the defendant's conduct in fact caused the plaintiff's harm, and whether the harm was reasonably foreseeable. See Weldy, 514 A.2d at 1261 (determining causation-in-fact and foreseeability in substantial factor inquiry); Maxfield, 151 A.2d at 230 (same). The question of proximate cause is for the fact-finder; the issue involves essentially no legal judgments, and we must therefore uphold the district court's finding unless it is clearly erroneous. Delta Air Lines Inc. v. United States, 561 F.2d 381, 394 (1st Cir. 1977). See Walls, 633 A.2d at 659-60; Marshall v. Nugent, 222 F.2d 604, 611 (1st Cir. 1955) (applying New Hampshire law).

The district court found from unrebutted evidence that, had Somersworth guarded the die-out motor drive shaft, Irving would not have become entangled in it, and thereby seriously injured, and found by a preponderance of the evidence that, but for the negligence of Chase and Ritchie during the 1975 and 1978 inspections, Irving would not have suffered the injuries she sustained in the accident. The court found that if either Chase or Ritchie had documented the violative condition of the drive shaft, Somersworth would have been notified of the violation in two ways: (i) by means of the required post-inspection closing conference, during which the compliance officer must advise the employer of all identified potential violations; and (ii) by means of the citation which more likely than not would have been issued, in view of the issuance of citations in 1975 and 1978 for similarly unguarded drive shafts. 942 F. Supp. at 1507-08.

Given Somersworth's policy to abate all cited violations within the period set by OSHA, and the consistency and promptness with which Somersworth had abated all other

violations for which it had been cited, the district court concluded that Somersworth would have guarded the drive shaft if this violative condition had been recognized during either the 1975 or the 1978 inspection. Id. Finally, the district court found that the risk of employee injury was a reasonably foreseeable result of the compliance officers' negligence, and that it was reasonably foreseeable that Somersworth would not guard the die-out motor drive shaft absent OSHA intervention. Id. at 1508-09. These findings are not clearly erroneous.

We hold that the district court correctly determined that, under New Hampshire law, the United States is liable to Irving for the negligent conduct of the 1975 and 1978 OSHA inspections of the Somersworth plant.[29] We emphasize that our holding is limited to the unique facts of this case

V.

In her complaint, Irving requested damages in the amount of one million dollars, the amount stated in her 1980 administrative claim. This request was consistent with the FTCA's command that, with limited exceptions, "[a]ction[s] under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency." 28 U.S.C. § 2675(b).[30] Twice in the sixteen-year travel of this

---

[29] The district court's determinations that "Irving has proven beyond any doubt that she suffered grievous harm when she became entangled with the unguarded rotating shaft," 942 F. Supp at 1505-06, and that "Irving's stooping to retrieve her glove does not constitute failure to exercise due care under these circumstances," id. at 1509-10, are not challenged here; nor is there any dispute concerning the court's calculation of damages.

[30] Section 2675(b) provides:

> Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon

case -- in 1983 and in 1995 -- Irving moved to amend her ad damnum clause so as to request damages in excess of one million dollars. Both motions, along with a motion for reconsideration, were denied.

As stated in her 1995 motion and in this appeal, Irving's primary justification for increasing the amount of her ad damnum is the substantial diminution in the value of her damage award caused by the extraordinary delays that have dogged this litigation, through no fault of the parties. In his memorandum decision, the district judge explained that, even though Irving had proven damages in excess of one million dollars, and notwithstanding his finding that she has been materially prejudiced by the delays, the court simply had no authority to award damages in an amount greater than that stated in her administrative claim because 28 U.S.C. § 2674 explicitly preserves the sovereign immunity of the United States from awards of pre-judgment interest, and, under Library of Congress v. Shaw, 478 U.S. 310, 321-22 (1986), compensation for delay, and loss resulting from the effects of inflation -- the "intervening facts" alleged as justifying the increase over the amount stated in the administrative claim -- are prohibited by the no-interest rule. 942 F. Supp. at 1513. As we find no legal basis to support a contrary ruling, we affirm.

VI.

For the foregoing reasons, the judgment of the district court is **affirmed**. **Costs on appeal awarded to the plaintiff-appellee.**

- Dissenting opinion follows -

---

allegation and proof of some intervening facts, relating to the amount of the claim.

SELYA, Circuit Judge (dissenting). As decided by the court, this unfortunate case is a poster child for bad law and bad policy. The analytical framework is not in dispute: the United States is liable in this instance if (1) the OSHA inspectors' negligent conduct is not exempted from the Federal Tort Claims Act's waiver of sovereign immunity, and (2) a private individual in like circumstances would incur liability. The first of these inquiries must be answered by resort to federal law, and the second by resort to state law (here, New Hampshire tort law). I doubt the correctness of the majority's rendition of both federal and state law, but the flaws in its reasoning seem more apparent as to the latter. Thus, assuming, for argument's sake, that the majority opinion correctly explicates the FTCA - a matter on which I take no view - it nevertheless sweeps too broadly in its interpretation of New Hampshire law. Because I believe that state law, properly applied, requires the entry of judgment in the government's favor, I write separately.

The majority holds that Corson v. Liberty Mut. Ins. Co., 265 A.2d 315 (N.H. 1970) (per curiam), settles the issue whether a private party who negligently conducts safety inspections is liable to an injured third party under New Hampshire's Good Samaritan doctrine. Corson admittedly supports application of the Good Samaritan doctrine to some safety inspections, see id. at 317, but the New Hampshire Supreme Court has not cited this 25-year-old per curiam decision on any subsequent occasion, and the Corson opinion itself is freighted with ambiguities. Contrary to my brethren, I think that Corson tells us relatively little about the case at hand.

New Hampshire's Good Samaritan doctrine, as it might be applied to an OSHA inspection, is unsettled, and thus, a federal court ought to undertake an informed prophecy about how the New Hampshire Supreme Court would rule if presented with this case. See Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148, 1151 (1st Cir. 1996). It is both my fervent hope and my strong belief that the state's highest court, mindful of

the grave policy implications that would attend an extension of liability to random workplace safety inspections, would not enlarge the Good Samaritan doctrine to impose a tort-law duty of care on a private actor who conducts an inspection under circumstances like those surrounding OSHA's visits to the Somersworth Shoe factory.

The FTCA provides that the "United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674 (1994) (emphasis supplied). In applying this provision to the circumstances at hand, I start with Corson - a case that my brethren deem controlling. With respect, their conclusion overlooks several salient differences between the factual setting of that case and the factual setting of the case before us. First, in Corson, the defendant insurance company advertised the availability and benefits of its inspection services, visited the employer's plant four times annually for several years, and advised the employer on specific safety improvements. See Corson, 265 A.2d at 317. All in all, the interaction between the inspector and the employer approached a partnership - a far cry from the sporadic, observational interaction between OSHA and Somersworth Shoe. Second, the Corson defendant insured the employer for all workers' compensation claims. See id. The insurer thus had a direct monetary stake in reducing the incidence of costly injuries. This, too, affords a marked contrast with the case at bar, since the United States had no direct pecuniary interest in Somersworth Shoe's safety practices.

Given these important dissimilarities, I think it fair to conclude that the New Hampshire Supreme Court has not confronted (let alone foreclosed) the specific question at issue here. Corson and the instant case share some superficial similarities, but they hardly seem "like." Indeed, Judge Coffin once provided a much closer analogy to the facts of this case than is present in Corson:

> The appropriate analogy to private life seems to be that of a corporate employer who has hired a safety

> director to insure that the firm's business environment is free from accidents and health hazards. Acting entirely within his authority the safety director orders his staff to check that other firms in the vicinity are meeting fire regulation standards. If one such employee fails to inspect a nearby firm's building and if it burns to the ground thereafter because of unsafe conditions [that] would have been rectified had the employee carried out his assigned task, is either the employee or the employer liable for this failing? We think not.

Zabala Clemente v. United States, 567 F.2d 1140, 1145 (1st Cir. 1977). Other comparisons are imaginable - for example, a nongovernmental public-interest group concerned with working conditions for immigrants conducts unsolicited, but tolerated, safety inspections of businesses on a sporadic basis.

As the New Hampshire Supreme Court has not determined whether the boundaries of its Good Samaritan doctrine encompass these types of inspections, a federal court must assess "analogous state court decisions, persuasive adjudications by courts of other states, and public policy considerations," Blinzler, 81 F.3d at 1151, and endeavor to predict the state court's likely ruling. A compendium of factors, including the factual context of the few relevant New Hampshire cases, the application of the Good Samaritan doctrine in other jurisdictions, public policy considerations, and the federal courts' general reluctance to expand state law, see, e.g., Carlton v. Worcester Ins. Co., 923 F.2d 1, 3 (1st Cir. 1991); Porter v. Nutter, 913 F.2d 37, 40-41 (1st Cir. 1990), militate against bringing OSHA inspections (or, at least, most OSHA inspections) within the fold of New Hampshire's Good Samaritan doctrine.

In its classic formulation, the Good Samaritan doctrine provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize

> as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owned by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts §324A (1977). Accordingly, the Good Samaritan doctrine supports tort liability in only three general scenarios. The Sixth Circuit recently suggested an "actor/monitor" dichotomy as a means of capturing the essence of all three scenarios and bypassing any need for an element-by-element analysis of the doctrine's applicability in FTCA inspection cases. See Myers v. United States, 17 F.3d 890, 904 (6th Cir. 1994). While this dichotomy's bright-line appeal may be a trifle illusory, the Sixth Circuit's central thesis - that, for the Good Samaritan doctrine to engulf workplace inspections, the inspectors must be more than "mere observers, monitoring the actions of others," id. - strikes me as sound. After all, under the doctrine's classic formulation a duty of care attaches to an inspection in any of the three general scenarios only when the inspector-inspectee relationship is more than "observational."

With this brief prelude, let us examine the trilogy of "Good Samaritan" scenarios as they play out on the set constructed by the district court's findings of fact.

1. **Increased Risk of Harm**. The majority stresses the Corson court's statement that a plaintiff's "case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right," thus permitting "[t]he inference . . . that the

[defendant's conduct] cloaked the defect, dulled the call to vigilance and so aggravated the danger." Corson, 265 A.2d at 318-19 (quoting Marks v. Numbil Realty Co., 157 N.E. 129, 130 (N.Y. 1927)). My colleagues read this statement as excusing Irving from showing that the OSHA inspectors affirmatively increased her risk of harm. See ante at 81-82 & n.26. I disagree with this interpretation, for it contravenes the weight of authority. See, e.g., Myers, 17 F.3d at 903 ("The test is not whether the risk was increased over what it would have been if the defendant had not been negligent. Rather, a duty is imposed only if the risk is increased over what it would have been had the defendant not engaged in the undertaking at all."); Zabala Clemente, 567 F.2d at 1147 (similar); Smallwood v. United States, __ F. Supp. __, __ (S.D. Ga. 1997) [1997 WL 809555, at *2] (similar); Kirk v. United States, 604 F. Supp. 1474, 1484 (D.N.H. 1985) (construing New Hampshire law and citing with approval numerous cases holding that this element requires some physical change or other material alteration of the circumstances); Restatement (Second) of Torts § 324A cmt. c, illus. 1 (imposing a duty where a repairman's negligent work renders a light fixture more dangerous).

The majority seems to say that, whatever the weight of authority may hold elsewhere, Corson's citation to Marks requires us to depart. I disagree. When considered in context, Marks fails to advance the majority's interpretation.

In Marks, a landlord negligently repaired a tenant's stairs. After the botched repair, the tenant "expressed misgivings as to the safety of the prop, but was assured by the landlord's agent that it would 'last forever.'" Marks, 127 N.E at 129 (emphasis supplied). The landlord's affirmative assurance of safety - not the mere fact of his inspection - "dulled the call to vigilance, and so aggravated the danger." Id. at 130. Thus, Marks comports with the weight of authority requiring an affirmative increase in the risk of harm before a duty of care attaches. It follows that Corson's reliance on

Marks is a powerful indication that, on this point, the New Hampshire Supreme Court swims within the mainstream.

There is yet another telltale. After its invocation of Marks, the Corson court string-cites a reference to section 324A(b) of the Restatement. That element of the Good Samaritan doctrine (discussed infra) deals with the situation in which a party assumes completely a duty owed by another to the injured third party. Hence, the citation strongly suggests that the Corson court believed that the inspector's relationship to the employer was far more than observational; it rose to the level of a partnership, if not an outright assumption of the employer's duty to maintain a safe workplace. Arguably, then, the Corson court rested its decision on the "assumption" prong of the doctrine, not on the "increased risk of harm" prong.

These contextual observations point up the uncertainties in the Corson court's language. If presented with an opportunity, I think it highly probable that the New Hampshire Supreme Court would resolve these ambiguities in accordance with the weight of authority elsewhere. Specifically, I believe that the state court would require a plaintiff in Irving's position to show that some affirmative action by the inspector increased the risk of harm. See, e.g., Myers, 17 F.3d at 903 n.15 ("[I]n this case, liability for increasing the risk would be proper had it been a MSHA inspector who lit a cigarette and caused the explosion, rather than a miner."); Blessing v. United States, 447 F. Supp. 1160, 1199 (E.D. Pa. 1978) ("[W]hile the inspections may not have improved matters, neither did they worsen them."). Irving has made no such showing here, and, accordingly, the United States is not liable to Irving under Restatement § 324A(a). To argue, as does the majority, that Irving prevails under the "increased risk of harm" scenario merely by proving that OSHA inspectors failed to observe and/or cite a dangerous condition created by her employer contradicts a bedrock principle of tort law - a historical reluctance to impose on one person a duty to rescue another in danger. See

W. Page Keeton et al., Prosser and Keeton on the Law Of Torts § 56, at 375 (5th ed. 1984); Marqua v. Eno, 662 A.2d 272, 278 (N.H. 1995); H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 898 (N.Y. 1928) (Cardozo, C.J.) ("The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good."); see also Myers, 17 F.3d at 903.

2. **Assumption of a Duty**. I need not tarry on this aspect of the Good Samaritan doctrine. The plaintitf does not argue that OSHA inspectors assumed Somersworth Shoe's duty to maintain a safe workplace. In all events, any such argument is foreclosed by the OSH Act's statutory language, which explicitly places primary responsibility for workplace safety on employers. See 29 U.S.C. § 654 (1994); see also Porter, 913 F.2d at 39 (explaining that New Hampshire law places on every employer a nondelegable duty to maintain a safe workplace). Consequently, the United States is not liable to Irving under Restatement § 324A(b).

3. **Reasonable Reliance**. The nub of the matter is the majority's determination that Somersworth Shoe reasonably relied on OSHA inspections to disclose unsafe plant conditions, thus bringing the plaintiff's case within Restatement § 324A(c). To be sure, Irving adduced some evidence of actual reliance (various Somersworth Shoe executives testified self-servingly that they relied on the OSHA inspections). Nevertheless, liability cannot be predicated on section 324A(c) without reasonable reliance, measured by an objective (not a subjective) standard. See Ayala v. United States, 49 F.3d 607, 614 (10th Cir. 1995). Reasonable reliance plainly requires a more active interrelationship than is present in most inspection contexts. This intuition drives the Sixth Circuit's actor/monitor dichotomy, see Myers, 17 F.3d at 904, and is borne out in those few cases, including Corson, that impose Good Samaritan liability on an inspector.

The majority gives Myers too short shrift. I suspect that this dismissive attitude stems from a misreading of the opinion. My brethren say that the Myers court requires exclusive reliance on a federal safety inspection as a predicate to Good Samaritan liability. On that basis, they charge that the Myers court conflated the separate liability scenarios portrayed in subsections (b) and (c) ("assumption" liability and "reliance" liability). This characterization is flawed. Rather than blurring the distinction between subsections (b) and (c), the Myers test posits that some threshold degree of interaction between an inspector and an employer must exist before any reliance by the employer or its employees is objectively reasonable. According to the Myers court, achieving the threshold requires more than "mere observation" but less than complete assumption of a duty. 17 F.3d at 904. This exposition of subsection (c)'s reliance requirement differs markedly from subsection (b)'s assumption requirement. Assumption liability under Restatement § 324A(b) does not necessitate any affirmative showing of reliance by the plaintiff; rather, reliance is presumed once the defendant steps into the shoes of the person primarily charged with the duty owed to the plaintiff. See Blessing, 447 F. Supp. at 1197 n.53 (explaining that subsection (b) "is much more addressed to a definition of the undertaking itself; it focuses on whether, independently of any increased risk or induced reliance, the Good Samaritan undertook to perform a duty owed by another to a third person").

Fairly read, subsection (c) asks whether a party, though not assuming the duty owed to the plaintiff, has created a sufficient relationship to induce reasonable reliance by the plaintiff. While this ad hoc approach contradicts the superficial bright-line quality of the actor/monitor dichotomy and highlights a possible weakness in the Myers court's rationale, case law confirms the soundness of the general principle upon which it rests. For example, Corson involved an active, long-standing relationship between the inspector and employer. See Corson, 265 A.2d at 317. A New Hampshire case relied on by the Corson court

involved a similar relationship. See Smith v. American Employers' Ins. Co., 163 A.2d 564, 566 (N.H. 1960) (noting that the insurer-inspector conducted monthly inspections of the plant in which the plaintiff was injured). Rare federal decisions that invoke the Good Samaritan doctrine in an inspection context likewise involve relationships that go beyond the sporadic, purely observational nature of most OSHA inspections. See, e.g., Kirk, 604 F. Supp. at 1477 (noting that an FmHA inspector visited plaintiff's construction site seven times in less than a year, approved contractor selection, reviewed building plans, approved variances, and assessed the builder's compliance with contractual conditions); Pierre v. United States, 741 F. Supp. 306, 309-10 (D. Mass. 1990) (noting that the EPA had taken title to, and completely renovated, a house sold to the plaintiff but had ignored its regulatory mandate to inspect for, and remove, lead-based paint); cf. Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1995) (holding the Good Samaritan doctrine applicable when the government undertook to operate a lighthouse). These cases most assuredly suggest that, at some level of involvement, a program of ongoing supervision or safety inspection can "induce [a party] to forgo other remedies or precautions against . . . risk." Restatement (Second) of Torts § 324A cmt. e. But two widely separated, unsolicited OSHA inspections, conducted without promise or expectation of future visits, do not pour a foundation on which a plaintiff can erect a claim of reasonable reliance. The OSHA inspectors who visited Somersworth Shoe were "mere observers," and transient ones at that.

Public policy concerns not present in Corson also counsel against its extension to all OSHA inspections. It is simply bad policy to penalize the government for undertaking programs that augment workplace safety measures. As Judge Coffin has observed:

> The end result of attaching liability to government attempts at all levels to supplement the safety precautions of private individuals and businesses, even where there is no reliance on the government's

> assistance, is far more likely to increase the reluctance of the government to involve itself in such matters than it is to install a higher quality of performance in the federal employees assigned to carry such functions out.

Zabala Clemente, 567 F.2d at 1150-51; see also Blessing, 447 F. Supp. at 1199. This policy concern was not implicated on the facts of Corson because the inspector and the employer had a shared financial interest. Imposing tort liability on the insurer would not discourage it from conducting safety inspections because unabated safety problems would operate to the insurer's economic detriment (substandard safety conditions mean increased accidents, which in turn mean more insurance payouts). Here, however, the financial interests of the government are not aligned with those of the employer. Thus, OSHA would have no counterbalancing incentive to stick with an inspection program despite potential tort liability.[31]

The New Hampshire legislature has acknowledged the detrimental effect of tort liability for negligent safety inspections by immunizing, post-Corson, workers' compensation insurers who conduct safety inspections. See N.H. Rev. Stat. Ann. § 281-A:8-I (Supp. 1996); see also Wise v. Kentucky Fried Chicken Corp., 555 F. Supp. 991, 996 n.4 (D.N.H. 1983) (discussing legislation). I mention this not because OSHA inspectors fall within New Hampshire's statutory immunity - they do not, and the conferred immunity, in any event, postdates Irving's accident - but because the same policy concerns addressed by the legislative response

---

[31] Addressing this policy concern does not accomplish a resurrection of the late, unlamented "regulatory function" exception to FTCA liability. See Berkovitz v. United States, 486 U.S. 531, 538 (1988). The very same concern for discouraging safety augmentation would exist if Good Samaritan liability attached, say, to a nongovernmental public-interest group's campaign of unsolicited, but tolerated, safety inspections on a sporadic basis.

are present, or even magnified, in this case. If the New Hampshire Supreme Court were confronted with these facts, I think it highly probable that the Justices would consider the policy choice exemplified by this statute, note the heightened concerns that exist in cases in which random safety inspections are not tied to the sale of insurance, and limit Corson accordingly. Cf. Dawkins v. White Prods. Corp., 443 F.2d 589, 593-94 (5th Cir. 1971) (finding that a state supreme court would limit a prior decision given the legislature's subsequent enactment of a statute changing the law as stated in the decision).

I am sympathetic both to the grievous nature of the plaintiff's injuries and to the inordinate delays that have dogged her prosecution of this litigation. Nevertheless, I keep thinking of the old saw that hard cases make bad law. In my judgment, the majority's derivation of New Hampshire law significantly dilates the scope of that state's Good Samaritan doctrine. The weight of persuasive authority, public policy concerns, and the federal courts' historic reluctance to expand state law past established frontiers persuade me that Corson commands a narrower compass than that provided by my brethren.[32] I must, therefore, respectfully dissent.

---

[32] Although my position would render moot the plaintiff's cross-appeal, I find no fault with the court's resolution of that appeal. See ante Part V.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

FEB 12 1999

No. 96-2368

GAIL MERCHANT IRVING,
Plaintiff, Appellee

v.

UNITED STATES OF AMERICA,
Defendant, Appellant

No. 96-2369

GAIL MERCHANT IRVING,
Plaintiff, Appellant

v.

UNITED STATES OF AMERICA,
Defendant, Appellee

ORDER OF COURT

Before
TORRUELLA, Chief Judge
BOWNES*, Senior Circuit Judge
SELYA, BOUDIN, STAHL, LYNCH and LIPEZ*, Circuit Judges

February 9, 1999

The initial request for rehearing en banc was made, albeit provisionally, by a judge of this court on April, 20 1998, well before the time for filing a petition for rehearing en banc had

expired. Moreover, the direction to the Clerk to enter the order granting rehearing en banc was issued within seven days of the expiration of that period. Because the en banc court had jurisdiction to proceed and because the plaintiff's arguments on the merits shed no new light on the matters heard and determined by the en banc court, the Rule 40 petition is denied.

By The Court
Phoebe D. Morse, Clerk

By: JANICE M. O'NEIL
Chief Deputy Clerk

---

* Judge Bownes and Lipez dissent from this order and would grant rehearing on the merits.

[cc: Ms. Pyles, Ms. Witt, Messrs. Cox, Cox, Gagnon, Hunger]

UNITED STATES COURT FOR THE DISTRICT OF NEW HAMPSHIRE

U.S. DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
AUG 29 1996
FILED

Civil No. 81-501-M

Gail Merchant Irving,

Plaintiff,

v.

United State of America,

Defendant.

MEMORANDUM DECISION

Plaintiff, Gail Merchant Irving, sues defendant, the United States, under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346 (b), 2671-2680, seeking damages for serious injuries she suffered in a workplace accident. On October 10, 1979, Irving's hair become caught in the unguarded rotating drive shaft of a die-out machine located near her work station at Somersworth Shoe Company. Regulations promulgated by the Occupational Safety and Health Administration ("OSHA") required that the rotating shaft be guarded. Before the accident, in 1975 and again in 1978, OSHA compliance officers inspected the Somersworth Shoe facility for the purpose of ensuring compliance with OSHA safety standards, but in neither inspection was the unguarded drive shaft identified or cited as violating OSHA standards. Irving claims in her sole cause of action that the OSHA compliance officers breached their duty under New

Hampshire's common law "Good Samaritan" doctrine to conduct the pre-accident inspections in a non-negligent manner. She also alleges that their failure to identify and cite the unguarded drive shaft as a violation of OSHA standards caused or contributed to cause her injuries. Irving's claim against the United States was tried to the court.

PROCEDURAL HISTORY[1]

Because the procedure history of this case is unusual, a brief survey of Irving v. United States is necessary to put the issues in proper context.

As mentioned, Gail Irving was severely injured in a workplace accident on October 10, 1979. Seeking to hold the United States liable for her injuries, she filed a timely administrative claim for damages with the appropriate federal agency, the United States Department of Labor. See 28 U.S.C. § 2675 (a). Her claim was denied and, on October 7, 1981, she filed suit in this court. See id.

A bench trail on the merits began on February 11, and concluded on February 14, 1985. Following trial, the court took the matter under advisement and, on January 27, 1988, dismissed Irving's suit without reaching the merits. The court determined that the discretionary function exception to the FTCA applied to OSHA inspections and, because the United States retained its sovereign immunity from suit involving such matters, the court was without subject matter jurisdiction over Irving's sole cause of action. Irving v. United States, No. C81-501-D, slip op. (D.N.H. Jan. 27, 1988) (Devine, C.J.). Irving appealed.

Shortly after the district court's dismissal order, but before the appeal was resolved, the United States Supreme Court decided Berkovitz v. United States, 486 U.S. 531

---

[1] The procedural history recitation is taken, in substantial part, from the First Circuit's most recent opinion in this case, Irving v. United States, 49 F.3d 830 (1st Cir. 1995).

(1988). The Berkovitz decision clarified the law concerning the FTCA's discretionary function exception as it pertains to governmental regulatory activities. Accordingly, the First Circuit vacated the district court's dismissal of Irving's complaint and remanded the case for further consideration in light of the new standards established in Berkovitz. Irving v. United States, 867 F.2d 606 (1st Cir. 1988) (unpublished order).

Responding to the First Circuit's mandate, the district court analyed Irving's claim in light of a then-recent post-Berkovitz OSHA case in which the Court of Appeals for the Fifth Circuit found the discretionary function exception applicable. Irving v. United States, No. C81-501-D, slip op. At 3 (D.N.H. Feb. 14, 1989) (Devine, C.J.) (citing Galvin v. OSHA, 860 F.2d 181 (5th Cir. 1988)). The trial court again dismissed Irving's suit, holding that it remained barred by the discretionary function exception. Id. at 4-5.

Irving again appealed, and the First Circuit again remanded the case, insisting on a case-specific application of Berkovitz. Irving v. United States, 909 F. 2d 598, 605 (1st Cir. 1990) ("Irving I") [2] The Court of Appeals directed the district court to make explicit factual findings as to whether "the thoroughness of [OSHA] inspections was . . . left up to the individual compliance officers" and whether those compliance officers had "policy-level discretion to fail to note and tell the employer about the violation which allegedly was the cause of Ms Irving's injuries." Id. (emphasis added).

Four years later, the district court issued a memorandum opinion, Irving v. United States, No. C81-501-SD, slip op. (D.N.H. June 6, 1994) (Devine, S.J.). Instead of resolving the discretionary function issue, however, the trial court decided the case on its merits, finding that during the 1975 and 1978

---

[2] Although Irving v. United States, 909 F.2d 598 (lst Cir. 1990) was, in fact, the First Circuit's second opinion in this case, it has, as the first published opinion, been assigned the label "Irving I."

OSHA inspections the die-out machine that caused Irving's injury was positioned "some two feet closer to the wall to its rear." Id. at 4. Therefore, the court determined that the drive shaft actually did comply with OSHA regulations during the earlier inspections because it had been "guarded by location" - "it was then in such location that employees working near it would not be exposed to injury." Id. at 3. And, because the drive shaft for the die-out machine was actually guarded by location during the 1975 and 1978 inspections, the court reasoned, OSHA compliance officers were not negligent in failing to identify or cite it as a violation of OSHA safety standards. Accordingly, judgment was again entered for the government, although this time on the merits.

Irving appealed for a third time, arguing, inter alia, that the district court's guarded-by-location finding was clearly erroneous and unsupported by the evidence. The government countered that the record supported the guarded by location finding and again argued that the discretionary function exception to the FTCA barred Irving's suit in any event. Once again, the Court of Appeals found for Irving. Irving v. United States, 49 F.3d 830 (lst Cir. 1995) ("Irving II").

Addressing the government's renewed discretionary function argument first, the court of appeals reiterated its holding in Irving I:

> [T]he applicability of the discretionary function exception [cannot] be decided without findings as to whether OSHA policy left the thoroughness of inspections a matter of choice for individual inspectors, and whether the inspectors had policy-level discretion to fail to note and tell the employer about the violation which allegedly caused plaintiff's injuries.

Irving II, 49 F.3d at 834 (citing Irving I, 909 F.2d at 605) (emphasis added). The Court of Appeals set aside the district court's finding that the rotating shaft of the die-out machine was guarded by location during the 1975 and 1978

inspections, id. at 836, vacated the judgment of the district court, and granted Irving's request for a trial de novo before a different district court judge, committing to the discretion of the new trial judge whether to proceed solely on the record of the 1985 trial. Id. at 837.

Consistent with the First Circuit's mandate, and with the express approval of the parties, this court proceeded on the trial record, supplemented by counsels' oral argument on November 21, 1995. The court earlier denied the government's motion to dismiss, rejecting an argument that the misrepresentation exception to the FTCA deprived the court of subject matter jurisdiction over Irving's cause of action. Irving v. United States, No. C81-501-M (D.N.H. March 13, 1996) (McAuliffe, J.). In addition, the court denied Irving's motion to increase her ad damnum to an amount in excess of the $1,000,000 she sought in her initial administrative claim in 1980. Irving v. United States, No. C81-501-M (D.N.H. March 13, 1996) (McAuliffe, J.). With all motions now disposed of, the court decides the case on the merits in light of all the evidence introduced at trial[3] and the arguments advanced by the parties, both orally and in their written submissions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As the procedural history of this case indicates, the parties' legal sparring over the last fifteen years has focused on two issues. First, the parties dispute whether the discretionary function exception to the FTCA preserves the government's sovereign immunity and deprives this court of subject matter jurisdiction over Irving's cause of action. Second, the parties dispute whether the machine on which Irving was injured was, in fact, guarded by location during the

---

[3] That evidence, of course, takes the form of trial exhibits and a complete transcript of the trial testimony. Throughout this order, full trial exhibits are referred to as "Ex.___" and trial testimony is identified by witness, date, and transcript page.

1975 and 1978 OSHA inspections. Each issue is, by itself, potentially dispositive of Irving's suit.

Because the discretionary function question implicates the court's subject matter jurisdiction, it would normally be addressed first. However, as Irving I and Irving II make clear, an acceptable answer to the discretionary function question depends on several, quite specific, findings of fact. Therefore, the court will first explain its factual findings related to Irving's accident and the OSHA inspections, including the location of the die-out machine during the 1975 and 1978 inspections. Then, based on the facts found, the court will explain why the discretionary function exception does not apply here, and, finally, the court will resolve the case on its merits.

I. FACTUAL BACKGROUND

In October of 1979, Gail Merchant Irving was working at the Somersworth Shoe Company plant in Somersworth, New Hampshire. Although Irving had worked in different shoe factories, including Somersworth Shoe, on and off for about four years (Irving, 2/11/85, p. 4), at the time of the accident she had been steadily employed at Somersworth Shoe only since mid-September, 1979. (Irving, 2/11/85, p. 6.)

A. Physical Layout of the Accident Scene in October, 1979

On October 10, 1979, Irving was at work in the stock fitting room of Somersworth Shoe operating a "marker" machine used to stamp the inner soles of shoes. The marker was a manually operated machine attached to a workbench; it did not have an electric power source. (Irving, 2/11/85, p. 8, 67; Rothwell, 2/12/85, p. 5.) Attached to the east end of the

same workbench was a die-out machine.[4] (Ex. 6, Floor Plan; Rothwell, 2/12/85, p. 4-5; Perron, 2/11/85, p. 111.)

Unlike the marker, the die-out machine was powered by a four- or five-horsepower electric motor. (Irving, 2/11/85, p. 67; Rothwell, 2/12/85, p. 5-6; Paul, 2/14/85, p. 36.) The motor was bolted to the concrete floor, directly beneath the west end of the workbench. It was connected to the die-out machine by means of a drive shaft which ran underneath the workbench. (Ex. 1, Photo of Bench Assembly; Ex. 14B, Photos 1-5.) The drive shaft ran horizontally (west to east), approximately 14 inches above the floor and was located approximately 16 inches inside (south of) the rear (north) edge of the workbench.[5] When the motor was running, the horizontal drive shaft rotated at high speed. (O'Connell, 2/12/85, p. 35.)

The eastern-most edge of the workbench abutted the east wall of the stock fitting room, (Rothwell, 2/12/85, p. 13; O'Connell, 2/13/85, p. 18; 2/14/85, p. 45), while the western-most edge of the workbench was on a main aisle.

---

[4] Together, the marker machine, die-out machine, and workbench were known as the "bench assembly." (See, e.g., O'Connell, 2/13/85, p. 18.)

[5] Shortly after Irving's accident, and before any material alterations were made to the bench assembly, three different people measured the location of the drive shaft. The measurements taken by Paul O'Connell, an OSHA safety engineer, indicate that the drive shaft was 12 inches above the floor and 16 inches in from the rear edge of the workbench. (O'Connell, 2/12/85, p. 166.) The measurements taken by Igor Paul, plaintiff's industrial engineering expert, indicate that the shaft was 14 inches above the floor and 16½ inches in from the rear edge of the workbench. (Paul, 2/14/85, p. 13) Ronald W. Perron, a captain with the Somersworth Police Department, measured the drive shaft to be 14" above the floor, and, although he did not measure the space between the edge of the workbench and the shaft, he estimated the distance to be about 2½ feet. (Perron, 2/11/85, p. 108, 113.) The evidence, then, most strongly supports the finding that the shaft was located approximately 14 inches above the floor and approximately 16 inches south of the plane created by the rear (north) edge of the workbench.

(Ex. 6, Floor Plan; Ex. 14B, Photo 2; Rothwell, 2/12/85, p. 4-5.) Approximately 2½ to 3 feet behind (north of) the workbench was a die rack. The die rack was approximately the same length as the workbench and also extended from the east wall of the stock fitting room to the aisle. (Ex. 6, Floor Plan; Ex. 14B, Photos 2, 14, 17; O'Connell, 2/13/85, p. 34.) Stored in the die rack were patterns, dies, and ink ribbons for use on the marker and die-out machines. (Irving, 2/11/85, p. 12; O'Connell, 2/13/85, p. 42.)

From time to time, Somersworth Shoe employees working on the marker were required to change the ribbon and/or the pattern on the machine. (Irving, 2/11/85, p. 8.) In order to retrieve patterns and ribbons from the die rack, it was necessary for the marker operator to enter the 2½ to 3 foot-wide aisle between the rear edge of the workbench and the die rack. (Ex. 6, Floor Plan; Ex. 14B, Photos 16, 17; O'Connell, 2/13/85, p. 42.) Employees also used this aisle to reach the power switch for the motor that ran the die-out machine. Because the switch was mounted on the east wall of the stock fitting room between the bench assembly and the die rack, the aisle between the workbench and the die rack provided the only access to the power switch. (Ex. 14B, Photos 13, 14; O'Connell, 2/13/85, p. 19.)

B. The Accident

On the afternoon of October 10, 1979, Irving needed to change the pattern and the ink ribbon on the marker machine. She picked up a pair of latex gloves that marker operators used to avoid getting ink on their hands when changing the ribbon and walked around the back of the bench assembly to retrieve a new pattern and ribbon from the die rack. While standing in the aisle between the workbench and the die rack, Irving inadvertently dropped one of her gloves. (Irving, 2/11/85, p. 12.)

When Irving bent over and reached down to retrieve the glove from the floor, her hair was drawn toward the drive shaft underneath the bench by the vacuum the shaft created as

it rotated at high speed.[6] Irving's hair became entangled in the shaft, and the force of the shaft's rotation wrenched her entire body down toward the floor and pulled her head into contact with the shaft, tearing her scalp from her skull and rendering her unconscious. (Gosselin, 2/11/85, p. 91; Wayne Irving, 2/11/85, p. 99-100; Rothwell, 2/12/85, p. 7-8.) As Irving's body lay over the drive shaft, with her hair still caught, the motor that powered the die-out machine continued to run. (Rothwell, 2/12/85, p. 7; Gosselin, 2/11/85, p. 90.)

Two of Gail Irving's co-workers, Joan Gosselin and Wayne Irving, extricated her from the drive shaft by turning off the motor and cutting her hair free. (Gosselin, 2/11/85, p. 85; Wayne Irving, 2/11/85, p. 99.) An ambulance crew arrived a short time later and took Irving to Wentworth-Douglass Hospital. She was later transferred to Maine Medical Center, where she was treated for severe neurological damage. (Wayne Irving, 2/11/85, p. 101-103; Ex. 23, Videotaped Testimony of Dr. McCann.)

C. Post-Accident OSHA Inspection

On October 16, 1979, OSHA conducted a post-accident inspection of Somersworth Shoe, before any material changes were made to the bench assembly. (Amirault, 2/12/85, p. 26.) During the post-accident inspection, senior safety engineer Paul O'Connell examined the marker/die-out bench assembly on which Irving was injured, taking measurements and photographs. (O'Connell, 2/12/85, p. 157; Ex. 14B, Photographs of Bench Assembly.) O'Connell found the bench assembly to be in violation of three separate but related OSHA safety standards. (Ex. 10, Citation and

---

[6] Professor Igor Paul, plaintiff's industrial engineering expert, testified to the vacuum effect created by any smooth, rapidly rotating shaft. (Paul, 2/14/85, p. 18.) Additional evidence that the rotating drive shaft for the die-out machine did, in fact, create the expected vacuum can be found in Exhibit 14B, photographs 20 through 24, which clearly show the many threads and fibers that had been drawn toward and wrapped around the shaft over the years.

Notification of Penalty at 1.) First, the bench assembly was in violation of an OSHA regulation that states, "Shafting under bench machines shall be enclosed by a stationary casing, or by a trough at sides and top or sides and bottom, as location requires." 29 C.F.R. § 1910.219(c)(2)(ii) (1995).[7] O'Connell found that the horizontal drive shaft that delivered power to the die-out machine was not guarded in any fashion. He then classified the violation as "serious," meaning that there was a "substantial probability that death or serious physical harm could result from [the] condition." 29 U.S.C. § 666(k); (O'Connell, 2/12/85, p. 159.) Indeed, the violation was so severe, and the unguarded shaft so dangerous, that O'Connell gave the violation a "severity value" of eight, the highest severity value used by OSHA at that time. (O'Connell, 2/12/85, p. 189; Ex. 10, OSHA Worksheet at 2.)

In addition to the unguarded horizontal shaft, O'Connell found two other violations of OSHA standards. Specifically, the pulley and drive belt on the electric motor that supplied power to the shaft were also unguarded in violation of 29 C.F.R. §§ 1910.219 (d) (1) and 1910.219 (e) (3) (i). These violations, too, were deemed "serious" in nature. (Ex. 10, Citation and Notification of Penalty at 1.) On October 23, 1979, OSHA fined Somersworth Shoe a total of $1800 for the three violations and ordered the company to abate the violations by November 10, 1979. The fine was later reduced to $1440. (Ex. 10, Penalty Modification at 1.)

D. Pre-Accident OSHA Inspections

OSHA compliance officers had also inspected the Somersworth Shoe facility on at least two occasions prior to Irving's accident. Compliance officer William Chase III inspected the plant on June 26, 1975 (the "1975 inspection"),

---

[7] The court has referred to the most recent version of the Code of Federal Regulations. However, the applicable regulations have not been materially altered since 1973, long before the earliest date relevant to this case.

and compliance officer John Ritchie inspected the plant on April 6, 1978 (the "1978 inspection"). In order to fully understand the significance of the 1975 and 1978 inspections, it is important, first, to review the regulatory framework within which they were conducted.

1. OSHA Regulatory Framework

In passing the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the "Act"), Congress sought to improve workplace safety by authorizing the Secretary of Labor to develop and promulgate mandatory occupational safety and health standards. 29 U.S C. §§ 651 (b) (3) & (b) (9). Employers and employees are of course duty bound to comply with all safety and health standards promulgated under the Act. 29 U.S.C. § 654. Nonetheless, in order to enforce compliance with those standards, the Secretary of Labor is authorized to "enter without delay and at reasonable times any . . . workplace or environment where work is performed by an employee of an employer" and to "inspect and investigate during regular working hours and at other reasonable times . . . any such place of employment and all pertinent conditions . . . therein." 29 U.S.C. § 657(a) (1) & (a) (2).

Regulations promulgated pursuant to 29 U.S.C. § 655 give OSHA Area Directors and compliance officers the authority to decide when and where workplace inspections will take place. 29 C.F.R. § 1903.7(a); Irving I, 909 F.2d at 603. In addition, OSHA regulations grant individual compliance officers significant control over the manner in which particular inspections are performed. Irving I, 909 F.2d at 603 ("[F]ormal regulations . . . give the individual compliance officers discretion to decide how to conduct the inspections."); see also 29 C.F.R. 1903.7 (b) & (d) (compliance officers may employ any "reasonable investigative techniques" as long as they do not amount to "unreasonable disruption of the operations of the employer's establishment").

OSHA routinely conducts inspections in response to workplace accidents, employee complaints, and as part of its "programmed" enforcement efforts. (Amirault, 2/12/85, p. 26-27.) After inspecting a workplace, the compliance officer is required to informally advise the employer of any apparent safety violations disclosed by the inspection. Irving I, 909 F.2d at 604; 29 C.F.R. § 1903.7(e). The compliance officer then prepares an inspection report describing all of the violations he or she observed. See 29 C.F.R. § 1903.14(a); (Amirault, 2/12/85, p. 57.) The compliance officer's superior, the Area Director, then reviews the inspection report. "If, on the basis of the report the Area Director believes that the employer has violated a [health or safety standard] . . . , he shall issue to the employer either a citation or a notice of de minimis violations . . . ." 29 C.F.R. § 1903.14(a).

There are three levels of OSHA violations, categorized according to the level of risk they pose to employees. At one end of the spectrum are "de minimis" violations - violations of OSHA standards that have "no direct or immediate relationship to safety or health;" a de minimis violation cannot be the basis of a citation or monetary penalty. 29 U.S.C. § 658 (a); 29 C.F.R. § 1903.14(a). At the other end of the spectrum are "serious" violations, which exist "if there is a substantial probability that death or serious physical harm could result from" the violative condition. 29 U.S.C. § 666 (k). Any violations deemed neither de minimis nor serious in nature fall in the middle, and are designated as "non-serious" violations. 29 U.S.C. § 666 (c); Hackney Inc. v. McLaughlin, 895 F.2d 1298, 1299 n.1 (10th Cir. 1990). The OSHA Area Director "shall" issue a citation for a serious or non-serious violation, "shall" assess a civil penalty of up to $1,000 for each serious violation, and "may" assess a civil penalty of up to $1000 for each non-serious violation. 29 C.F.R. § 1903.14 (a); 29 U.S.C. §§ 658, 666 (b) & (c). In addition to subjecting the employer to citation and possible monetary penalty, conditions that constitute serious or non-serious violations of OSHA safety standards must be abated by the employer

within the time period fixed by the Area Director. 29 C.F.R. § 1903.14 (b).

2. OSHA Policy Governing the 1975 & 1978 Inspections

While the Act and OSHA regulations generally leave many decisions regarding inspections in the hands of Area Directors and compliance officers, the scope of the Somersworth Shoe inspections William Chase and John Ritchie performed in 1975 and 1978 was dictated by less formal, but no less binding, OSHA policy. Francis Richard Amirault, the Area Director for whom both Chase and Ritchie worked, testified extensively and with obvious candor as to what was required of the two compliance officers during their inspections of Somersworth Shoe. In addition, Chase and Ritchie testified about their own understandings of their inspection duties.

Chase and Ritchie were both instructed to perform "wall-to-wall" inspections of the Somersworth Shoe facility.- (Amirault, 2/12/85, p. 27; Chase, 2/12/85, p. 102; Ritchie, 2/12/85, p. 147.) In conducting wall-to-wall inspections of the plant, both compliance officers were "charged to look at the entire plant," (Amirault, 2/12/85, p. 51), and "required" to perform a "complete inspection of the facility." (Chase, 2/12/85, p. 133; see also Amirault, 2/12/85, p. 28; Ritchie, 2/12/85, p. 147.) As the First Circuit noted, the compliance officers "could not choose simply to spot check certain areas." Irving I, 909 F.2d at 604.

Indeed, OSHA policy dictated the thoroughness required of the 1975 and 1978 inspections to an even greater degree. Chase and Ritchie had to do more than merely walk through each room of the Somersworth Shoe plant. Rather, OSHA policy required them to "observe any place where an employee work[ed]." (Amirault, 2/12/85, p. 30, 55.) Toward that end, compliance officers had to "look at every operation" in the facility. (Amirault, 2/12/85, p. 30.) Thus, they had no

choice but to inspect every operational machine and work station in the plant.[8]

As noted earlier, OSHA regulations required the Area Director to review the compliance officers' inspection reports for the purpose of categorizing violations and issuing notices and citations. In order to make the Area Director's review meaningful, OSHA policy required Chase and Ritchie to document or record all of the violations they observed as they conducted their inspections, whether those violations appeared to them to be de minimis, serious, or non-serious in nature. (Amirault, 2/12/85, p. 55, 57.) As Area Director Amirault stated, Chase and Ritchie were required to "document any hazardous conditions that they would see." (Amirault, 2/12/85, p. 28; see also 2/12/85, p. 25, 57-58.)

OSHA policy did not, however, require Chase and Ritchie to record nominal violations of applicable regulations if there was no potential employee exposure to the violative condition. In order to constitute even a de minimis violation of OSHA safety standards, a workplace condition must both: (1) fail to satisfy the terms of an applicable safety regulation promulgated by the Secretary of Labor; and (2) be located in a position such that employees could potentially be exposed to it. (Amirault, 2/12/85, p. 58, 94-95.) Because potential exposure is a necessary component of a violation, the OSHA

---

[8] At oral argument, the government conceded that OSHA policy required Chase and Ritchie to inspect every "operation" in the Somersworth Shoe facility. (See Transcript of 11/21/95 Oral Argument ("Tr.") at 107-109.) The government argues, however, that a duty to inspect every "operation" is somehow different from a duty to inspect every "machine." (Tr. at 108.) But the evidence makes clear, and the government does agree, that the term "operation" as used by Area Director Amirault included every machine that was operational or, phrased differently, every machine or workstation at which an employee normally worked, regardless of whether an employee was actually operating the machine during the inspection itself. (Tr. at 108-09; Amirault, 2/12/85, p. 30, 55 (agreeing that inspection should take place "machine by machine by machine."); Chase, 2/12/85, p. 129-131.)

compliance officers were not required to report a condition that nominally violated OSHA regulations but posed no risk of exposure to employees.

OSHA policy, then, required Chase and Ritchie to perform wall-to-wall inspections of the Somersworth Shoe plant, which included a requirement that they inspect every operational machine in the facility. In addition, the compliance officers were required to document every violation they observed, whether it appeared to be a de minimis, serious, or non-serious violation of OSHA safety standards.[9]

3. 1975 Inspection

On June 26, 1975, OSHA compliance officer William Chase III inspected the Somersworth Shoe facility. Because Chase was not familiar with the layout of the plant, he relied on a Somersworth Shoe representative to show him every room in which employees worked. (Chase, 2/12/85, p. 124.) Chase was taken into every room in the plant, including the stock fitting room. (Chase 2/12/85, p. 124, 127; Ex. 8, OSHA Compliance Worksheet at 4, item 8.)

During the course of his inspection, Chase noticed and documented a total of 39 violations of 9 separate OSHA standards, including 14 power transmission mechanisms left unguarded in contravention of 29 C.F.R. § 1910.219. (Chase, 2/12/85, p. 126, 140; Ex. 8, OSHA Proposed Penalty Worksheet at col. 2.) Three of the unguarded power transmission mechanisms were horizontal drive shafts located in the cutting department. (Ex. 8, OSHA Compliance Worksheet at 3, item 6; Chase, 2/12/85, p. 126.) Chase did not, however, notice or document any violative conditions related to the bench assembly on which Irving was later

---

[9] The answer to the Court of Appeals's explicit question - "Did OSHA policy leave the thoroughness of the inspections a matter of choice for individual inspectors?" - is, therefore, "No." See Irving II, 49 F.3d at 833.

injured. (Chase, 2/12/85, p. 128; Ex. 8, OSHA Compliance Worksheet.)

Immediately following his inspection, Chase held a closing conference with Samuel Freedman, then the general manager of Somersworth Shoe. The two men discussed all of the violations Chase found and agreed upon an abatement schedule. (Ex. 8, OSHA Narrative at ¶ 12.) On July 7, 1975, OSHA issued a citation to Somersworth Shoe for nine separate groups of non-serious violations. OSHA did not, however, levy a monetary penalty against Somersworth Shoe for any of the cited violations. The bench assembly on which Irving was later injured was not cited. (Ex. 8, Citation at 1-3.)

4. 1978 Inspection

On April 6, 1978, OSHA compliance officer John Ritchie inspected Somersworth Shoe. During the course of his inspection, Ritchie noticed and documented ten separate violations of OSHA safety standards. (Ex. 9, OSHA Worksheet at 1-10.) Three of those violations concerned unguarded drive belts. (Ex. 9, OSHA Worksheet at 7-9; Ritchie, 2/12/85, p. 150.) None of the violations Ritchie documented was located in the stock fitting room. (Ex. 9, OSHA Worksheet at 1-10.) Ritchie also found that Somersworth Shoe had an inadequate safety training program and no health or safety staff. (Ex. 9, OSHA Narrative at ¶ 15; Ritchie, 2/12/85, p. 150.)

As Chase had done three years earlier, Ritchie held a closing conference with Samuel Freedman in which the two men reviewed all of the violations Ritchie found during his inspection. On April 12, 1978, OSHA cited Somersworth Shoe for eight separate groups of violations, including three instances of unguarded drive belts. OSHA did not fine Somersworth Shoe, but ordered all violations abated by May 8, 1978. The bench assembly on which Irving was later injured was not cited. (Ex. 9, Citation and Notification of Penalty at 1-2.)

E. Chase and Ritchie's Failure to Note Violation

It is the failure of Ritchie and Chase to identify and document the unguarded horizontal drive shaft on the bench assembly, and OSHA's failure to cite it, that form the basis of Irving's cause of action. As noted earlier, the decision to cite an employer for a violation of OSHA safety standards is, according to applicable regulations, made by an OSHA Area Director after his or her review of a compliance officer's inspection report. See 29 C.F.R. § 1910.14(a).[10] The inspection reports of Ritchie and Chase did not in any way reference the drive shaft in question. (See Ex. 8, OSHA Compliance Worksheet, Narrative, Proposed Penalty Worksheet; Ex. 9, OSHA Worksheet, Narrative.) Therefore, the court must determine the reason or reasons why neither compliance officer identified or recorded the drive shaft as being in violation of OSHA safety standards.

Both parties agree that the drive shaft was not guarded by a stationary casing or trough as required by 29 C.F.R. § 1910.219 (c) (2) (ii) during the 1975 and 1978 inspections. In fact, the evidence overwhelmingly supports the conclusion that the shaft was not guarded by a casing or trough at any time prior to Irving's accident. (Rothwell, 2/12/85, p. 14-15; Couture, 2/12/85, Supp. at 8-9; Brooks, 2/12/85, Supp. at 13-15.) While the parties agree that the shaft had no guard, the government and Irving concur on few other facts related to the 1975 and 1978 inspections.

---

[10] Under 29 C.F.R. § 1903.21 (e), the Area Director may delegate to a compliance officer his or her responsibility to review inspection reports and issue citations. There is no evidence that Area Director Amirault so delegated his responsibilities in this case. Although compliance officer O'Connell signed the 1978 citation "for F.R. Amirault," the Area Director reviewed the 1975 and 1978 inspection reports for the purpose of categorizing violations and issuing appropriate citations. (See Ex. 8, OSHA Inspection Report at 1, § 36; Ex. 8, Citation at 2, 3, ¶ 14; Ex. 9, OSHA Inspection Report at 1, ¶ 38.)

1. Guarded by Location

In order to hold OSHA liable for her injuries, Irving must first prove that the drive shaft was in violation of OSHA safety standards during one or both of the pre-accident inspections. Although the government concedes that the horizontal drive shaft was not guarded by a casing or trough, it has argued vigorously from the outset of this case that the shaft was "guarded by location" during both the 1975 and 1978 inspections.

As discussed earlier, potential employee exposure is a necessary component of a documentable violation of OSHA safety standards. The government argues that during the 1975 and 1978 inspections there existed no potential exposure to the unguarded horizontal drive shaft because it was guarded by location. That is, the government contends that in 1975 and 1978 the bench assembly was located approximately two feet to the rear (north) of the position it occupied when the accident occurred. With the bench in that position, the argument continues, access to the rear of the assembly would have been blocked by the die rack. Without access to the back of the bench, employees would not have been exposed to the serious danger otherwise posed by the unguarded rotating drive shaft. Therefore, the government concludes, in 1975 and 1978 there was no violative condition for Chase and Ritchie to notice and document.

Irving counters that the evidence shows that in 1975 and 1978 the bench assembly was in substantially the same location and condition it was in at the time of her accident.[11]

---

[11] In support of her position, Irving contends that under New Hampshire law "where the location of an object is at issue, evidence of the prior or subsequent location of that same object is considered strongly suggestive of its position at the time of the occurrence in question." (Plaintiff's Request for Findings of Fact and Conclusions of Law at 12, ¶ 50.) By this, Irving seems to suggest that evidence of the bench assembly's 1979 location is entitled to some special weight. Under New Hampshire law, evidence of the location of an object is admissible for the

In support of its argument that the bench assembly was moved, the government relies heavily on the testimony of compliance officer Chase. Although Chase apparently had no independent recollection of the bench assembly (Chase, 2/12/85, p. 118), he testified that the machine must have been guarded by location during the 1975 inspection. Chase's opinion was based largely on his belief that he simply would not have failed to notice a violation as flagrant as the unguarded shaft on which Irving was injured, had it existed during his inspection. (Chase, 2/12/85, p. 110, 119.) He stated:

> I wouldn't miss something like that on inspection, not when I already found the unguarded shafts on another piece of equipment. There's no way I missed it. Something has had to change relative to that piece of equipment [between my inspection and Irving's accident].

(Chase, 2/12/85, p. 119.) In fact, Chase felt that the unguarded rotating shaft on which Irving was injured was such a flagrant violation of OSHA safety standards that, assuming he inspected every operation in the Somersworth Shoe plant, he would not have failed to note the violation even in a "careless moment" or on his "wors[t] day." (Chase, 2/12/85, p. 134.)

In essence, then, Chase testified that because he did not notice or document that the drive shaft was in violation of OSHA safety standards the machine must have been guarded by location; and the machine must have been guarded by

---

purpose of showing that the object occupied the same position at a prior point in time. State v. Harris, 101 N.H. 95, 96, 133 A.2d 483, 484 (1957), Dube v. Bickford, 92 N.H. 362, 31 A.2d 64 (1943). However, the evidence of subsequent location does not create a legal presumption to that effect, or carry more legal weight than any other evidence equally probative of prior location. Harris, 101 N.H. at 96, 133 A.2d at 484. The court will, therefore, consider the location of the bench assembly in 1979 as evidence of the location it occupied in 1975 and 1978 but will only credit it commensurate with its probative value in light of all of the evidence introduced at trial.

location because he did not notice or record the violation. Reciting the argument highlights its circularity. But, to point out the circular nature of the government's position is not necessarily to discredit it entirely or deem it hopelessly inconsistent with what actually happened. The argument's circularity, however, does render it suspect to the extent it is not corroborated by extrinsic evidence.

In hopes of bolstering its theory that the machine was guarded by location during the 1975 and 1978 inspections, the government points to the testimony of two long-time Somersworth Shoe employees. Roger Couture worked at Somersworth Shoe from 1944 until 1979. From approximately 1974 until early 1979, he was foreman of the stock fitting room. (Couture, 2/12/85, Supp. at 3-4.) Couture testified on direct examination that the bench assembly "might have been moved, probably the whole thing, one or two feet, but that was it." (Couture, 2/12/85, Supp. at 5.) On cross examination he added, "The only thing is it was moved . . . a little back . . . about maybe a foot." (Couture, 2/12/85, Supp. at 9.) Similarly, Bruce Brooks, who worked in the stock fitting room from 1950 until early 1984 and regularly operated the die-out machine in question, noted that Somersworth Shoe "had moved a bench and they had moved a motor machine in that area at one time. Just when that was, I couldn't tell you." (Brooks, 2/12/85, Supp. at 18.)

The government relies heavily on these inconclusive statements, but ignores a larger body of evidence that overwhelmingly supports the notion that the rotating shaft was neither guarded by location nor otherwise inaccessible at any time prior to Irving's accident. In fact, the testimony of Couture and Brooks, viewed in its entirety, also supports the notion that the bench assembly had not been altered or moved in any material fashion in the five years before the accident. Couture stated that the machine had been in the same place and in the same condition throughout his tenure as foreman, that is, from 1974 until early 1979. (Couture, 2/12/85, Supp. at 4-5.) He further testified that in 1979 the condition of the

machine was exactly the same as it had been in 1975 and 1978. (Couture, 2/12/85, Supp. at 8.)

The bulk of Brooks' testimony also strongly supports the proposition that the machine had been at or near its present position "years before Gail was on it." (Brooks, 2/12/85, Supp. at 17; see also, 2/12/85, Supp. at 15-17.) Significantly, Brooks testified that throughout his tenure at Somersworth Shoe employees had access to the unguarded rotating shaft from both the front and rear of the bench assembly. (Brooks, 2/12/85, Supp. at 15.)

In addition to the testimony of those personally familiar with the bench assembly's condition and location during the 1975 and 1978 inspections, Irving points to physical and testimonial evidence establishing the permanence of the position the bench and motor occupied during the 1975 and 1978 inspections and through the time of the accident. The most convincing evidence came in the form of photographs taken by Paul O'Connell during his post-accident inspection. The photos were introduced at trial as plaintiff's Exhibit 14B (O'Connell, 2/12/85, p. 157), and clearly show that the workbench, the electric motor that drove the die-out machine, and the supports for the drive shaft were all securely bolted to the concrete floor of the stock fitting room. (Ex. 14B, Photos 1, 2, 4, 5, 15, 20, 21, 22, 23.) Igor Paul, plaintiff's expert witness, also examined the bench assembly after the accident and concluded that it could only be repositioned by removing all of the bolts from the concrete floor and, presumably, reinserting them into the floor at a different location. (Paul, 2/14/85, p. 14, 30.)

The photographs do not support the hypothesis that the bench had been moved between the OSHA inspections and the accident. In fact, O'Connell's photos are convincing evidence that the bench assembly never occupied a position in the Somersworth Shoe plant other than the position it occupied in 1979. The concrete floor around the bench assembly contains no empty bolt holes or other blemishes that one would expect to find if the bench assembly had been

unbolted, relocated, and rebolted to the floor, especially if it had been moved only a few feet. (Ex. 14B, Photos 1-5, 1416, 20-24.) In addition, the wear marks beneath the foot pedal of the marker machine indicate that the bench assembly had, in 1979, occupied the same position for quite some time. (Ex. 14B, Photos 1, 2, 4, 5.)

Finally, the position of the bench assembly vis-a-vis the die rack and the power switch renders it highly unlikely that the drive shaft was guarded by location as a result of its proximity to the rack or to any other workplace condition. Neither party contends, and the evidence does not show, that the die rack was moved or materially altered at any time between 1975 and 1979.[12] The die rack had shelves extending down to the floor behind the bench assembly, and Somersworth Shoe employees required regular access to the dies and patterns kept on those shelves. (Ex. 14B, Photos 1-3, 16, 17; Irving, 2/11/85, p. 8; O'Connell, 2/13/85, p. 42.) In addition, the aisle between the bench assembly and the die rack provided the only access to the power switch for the die-out machine. (Ex. 14B, Photos 13, 14.)[13] Because employees needed access to the dies, patterns, and power switch, and because the narrow aisle between the rack and the bench assembly provided the only access to these items, the

---

[12] Indeed, the die rack was considered so permanent a fixture that O'Connell treated it as if it were a partition or wall within the stock fitting room. (O'Connell, 2/13/85, p. 18.) Rothwell testified that the rack could only be repositioned through disassembly and was, in effect, immovable. (Rothwell, 2/12/85, p. 13-14.)

[13] The court recognizes, as did Paul O'Connell, that the power switch was theoretically moveable. (See O'Connell, 2/13/85, p. 37) However, the photographs of the switch indicate that it was attached to the east wall of the stock fitting room in a secure and relatively permanent manner and reveal no signs that it was recently moved. (Ex. 14B, Photos 13, 14.) In addition, Couture and Rothwell confirmed that there had been no changes made to the set-up of the die-out machine from 1974 through 1979. (Couture, 2/12/85, p. 9; Rothwell, 2/12/85, p. 4-6.)

aisle could not be eliminated without rendering both the die-out and marker machines useless.

Yet, in order for the drive shaft to have been effectively guarded by location, the aisle between the bench assembly and the die rack would have to have been eliminated entirely. At trial, O'Connell implied that if the bench assembly had been positioned one or two feet to the rear of the position it occupied in 1979 the shaft would have been guarded by location yet employees still would have been able to use the aisle to reach patterns, dies, and the power switch. (O'Connell, 2/13/85, p. 34-42.) The implication is not persuasive. The drive shaft could not have been effectively guarded by location if a functional aisle existed between the bench assembly and the die rack. In fact, if the width of the aisle had been reduced even further, but the aisle had not been eliminated, employees' exposure to the rotating shaft would have been more, not less dangerous, because they would have had less room to maneuver between the shaft and the rack, especially if they bent over to pick up a dropped item or to retrieve a pattern from the bottom shelf. Therefore, even if the government were correct in postulating that during the 1975 and 1978 inspections the bench assembly was located one or two feet to the rear of its 1979 position, the shaft still would not have been effectively guarded by location.

The court finds that Irving has demonstrated, by a decided preponderance of the evidence, that during the 1975 and 1978 inspections the bench assembly was in the same position it occupied at the time of her injury. It was not guarded by location. Operation of the die-out machine while the drive shaft remained unguarded was in flagrant violation of OSHA safety standards. The die-out machine was in operation during both inspections.[14]

---

[14] Necessary to this conclusion is a finding that the die-out machine was not taken out of operation, thereby eliminating worker exposure to the rotating shaft, for any significant period of time. The evidence establishes that the die-out machine was in near continuous operation during the

2. Failure to Inspect Every Machine

Despite the flagrant nature of the OSHA violation, Chase and Ritchie did not notice or document the dangerous condition during the 1975 and 1978 inspections. The government argues, however, that those failures cannot, even if they amounted to actionable negligence under New Hampshire law, support the imposition of liability under the FTCA because OSHA inspections are discretionary functions, for which Congress has preserved the government's immunity from suit. In order to determine whether the discretionary function exception to the FTCA's immunity waiver applies to this suit, it is first necessary to determine why the inspectors failed to notice and document the unguarded drive shaft.

The existence of the safety violation in 1975 and 1978 having been established, the evidence is arguably consistent with two plausible explanations for the compliance officers' oversight. First, Chase and Ritchie could have inspected the bench assembly but failed to notice the unguarded drive shaft. Second, both compliance officers could have neglected to inspect this particular bench assembly and, as a result, failed to notice the obvious unguarded drive shaft.[15] It is, of course, very difficult to determine precisely what happened during two separate inspections approximately two decades ago. But,

---

relevant time frame. Both its position and condition remained virtually unchanged. (Rothwell, 2/12/85, p. 4-5; Couture, 2/12/85, Supp. at 8; Brooks, 2/12/8S, Supp. at 17; Chase, 2/12/85, p. 131.)

[15] The government suggests a third possibility: Both compliance officers noticed the unguarded drive shaft and, despite the obvious nature of the violation, made a judgment call that there was not sufficient potential employee exposure to justify documenting the condition as a violation of OSHA safety standards. The record does not support this suggestion and the court rejects it as a factual matter; neither compliance officer testified that he noticed the unguarded drive shaft, much less engaged in the judgment analysis the government seeks to ascribe to him. To the contrary, Chase testified that he never noticed the unguarded drive shaft and, if he had, he would have recognized it as a blatant and unmistakable violation of OSHA safety standards.

upon careful examination of the record, the preponderance of the evidence introduced at trial supports the conclusion that both Chase and Ritchie failed to inspect the bench assembly on which Irving was subsequently injured, and the court so finds.

Both Chase and Ritchie were required to examine every operation in the Somersworth Shoe plant during their respective wall-to-wall inspections and did not possess the discretion to do otherwise. Chase testified that he walked down every aisle of every floor that management indicated employees worked on. (Chase, 2/12/85, p. 134.) In addition, Chase's inspection report shows that he inspected many machines in the stock fitting room and elsewhere in the plant. (Ex. 8, OSHA Compliance Worksheet at 1-4.) The bench assembly was located directly on a main aisle in the stock fitting room. (Ex. 6, Floor Plan.) Chase did not testify, however, that he inspected every operation in the facility. Ritchie did not testify at all regarding the thoroughness of his inspection in 1978, but his inspection report indicates that he, too, inspected many machines in the plant. (Ex. 9, OSHA Worksheet at 1-10.) Unfortunately, none of these facts, taken alone or together, is direct, probative evidence of whether or not the compliance officers actually inspected the particular bench assembly in question.

There is, however, considerable circumstantial evidence regarding the scope of the inspections actually performed. Every trained person who laid eyes on the bench assembly, or saw a photograph of it after the accident, recognized the unguarded drive shaft as a blatant and very serious violation of OSHA safety standards. Chase testified that if he had, in fact, inspected the bench assembly, he could not have failed to recognize that the drive shaft was a serious violation. (Chase, 2/12/85, p. 134.) While he acknowledged that inspectors do, on occasion, fail to notice violations, he "wouldn't miss something like that; it's too obvious, positively." (Chase, 2/12/85, p. 113.)

Area Director Amirault concurred, stating that if a prudent inspector saw the bench assembly depicted in O'Connell's post-accident pictures, he should have noticed the unguarded drive shaft and recognized it as a violation of OSHA safety standards. (Amirault, 2/12/85, p. 66-67.) O'Connell, too, confirmed the obvious nature of the violation, classifying it as "serious" and assigning it a severity value of eight. (O'Connell, 2/12/85, p. 159.)

In light of that evidence, a finding that Chase and Ritchie inspected the bench assembly but failed to notice the unguarded drive shaft or recognize it as a violation of OSHA safety standards would be tantamount to a finding that both compliance officers were not merely negligent, but utterly incompetent. As Chase stated, any compliance officer looking at the bench assembly would have recognized the unguarded drive shaft as a serious violation on his or her worst day.

Of course, the record would not support a finding that Chase and Ritchie were utterly incompetent. The evidence establishes that both men were quite skilled and thorough in identifying and documenting violative conditions. Both were experienced workplace inspectors who obviously took their responsibilities seriously. (Chase, 2/12/85, p. 100-01; Ritchie, 2/12/85, 14546.) Chase had performed approximately 180 workplace inspections prior to inspecting the Somersworth Shoe plant. (Chase, 2/12/85, p. 100-01.) During the 1975 inspection, Chase noticed and documented 39 violations of OSHA safety standards, including 14 power transmission mechanisms left unguarded in violation of 29 C.F.R. 1910.219, the same general regulation under which Irving's bench assembly was later cited. Similarly, Ritchie noticed and recorded 10 separate violations during his inspection of Somersworth Shoe, including three unguarded drive belts. The preponderance of the evidence, therefore, decidedly supports the conclusion that both Chase and Ritchie would have recognized that the bench assembly violated OSHA safety standards requiring the guarding of power transmissions if they had, in fact, inspected it.

Given these findings,[16] there is but one probable, realistic explanation for Chase and Ritchie's failure to notice and document the unguarded drive shaft: Neither compliance officer actually inspected the bench assembly during his tour of the Somersworth Shoe plant. Chase and Ritchie were not incompetent; they simply were not as comprehensive in their inspections as OSHA policy required them to be. Rather than inspect every operation in the plant, they inspected most of them, in effect spot-checking (albeit thoroughly) the facility for violations of OSHA safety standards. It is the inspectors' failure to inspect every operation, as was required of them, that properly forms the basis of Irving's cause of action under New Hampshire's Good Samaritan doctrine and the FTCA.

II. DISCRETIONARY FUNCTION EXCEPTION

Irving necessarily brings her Good Samaritan action against the government under the FTCA, 28 U.S.C. §§ 1346 (b), 2671-2680. The FTCA operates as a broad waiver of sovereign immunity, giving district courts jurisdiction to hear tort suits against the United States for damages caused by federal employees acting within the scope of their duties, where the United States, if a private person, would be liable under the law of the place where the tort occurred. 28 U.S.C. §§ 1346(b), 2674; see also Irving I, 909 F.2d 598, 600 (lst Cir. 1990). This broad waiver of sovereign immunity is, however, subject to several statutory exceptions, including the so-called "discretionary function exception," which exempts:

---

[16] The relevant findings include: (1) The drive shaft was not guarded by a casing or trough during the 1975 or 1978 inspections; (2) the drive shaft was not guarded by location or otherwise rendered inaccessible to employees or inoperative during the 1975 or 1978 inspections; (3) Chase and Ritchie did not observe the unguarded shaft and make a judgment call that it was not a violation of OSHA safety standards; and (4) had Chase and Ritchie inspected the bench assembly they would have noticed and documented the unguarded drive shaft as a serious violation of OSHA safety standards.

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680 (a). Section 2680 "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." United States v. Varig Airlines, 467 U.S. 797, 808 (1984); see also Irving I, 909 F.2d at 600. "Because § 2680 (a) is a limitation on the waiver of sovereign immunity, cases which fall within the discretionary function exception are dismissed for lack of subject matter jurisdiction." Irving I, 909 F.2d at 600.

"The determination of whether the discretionary function exception bars a suit against the Government is guided by several established principles." Berkovitz v. United States, 486 U.S. 531, 536 (1988). First, "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." Id. (quoting Varig Airlines, 467 U.S. at 813). The inquiry, then, focuses on the "permissible range of action available to the government employee allegedly at fault." Irving I, 909 F.2d at 600. Specifically, "[i]n examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice." Berkovitz, 486 U.S. at 536; Irving I, 909 F.2d at 600. "[T]he requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action

for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" Irving II, 49 F.3d 830, 835 (lst Cir. 1995) (quoting United States v. Gaubert, 499 U.S. 315, 322 (1991)) (internal quotations omitted, emphasis supplied in Irving II).

Even if the challenged conduct is the product of an employee's permissible exercise of judgment, suit is barred only if that judgment "is of the kind that the discretionary function exception was designed to shield. The basis for the discretionary function exception was Congress' desire to 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'" Berkovitz, 486 U.S. at 536-37 (quoting Varig Airlines, 467 U.S. at 814). "The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy." Id. at 537. "In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." Id. (emphasis added).

The first step in deciding the discretionary function exception question presented here, then, is determining exactly what constitutes the "challenged conduct." See, e.g., Gaubert, 499 U.S. at 327-28; Berkovitz, 486 U.S. at 539-40, 543-44; Varig Airlines, 467 U.S. at 814-15, 819. Irving's complaint alleges that "[t]he [1975 and 1978 inspections of said Somersworth Shoe Company were performed in a negligent . . . manner in that the defendant failed to issue citations for violations of the said Occupational Safety and Health Act." (Irving's Complaint at 3, ¶ 9.) It adds that the government "breached its duty to the employees of said Somersworth Shoe Company, including the plaintiff, by negligently performing the said inspections of said shoe shop." Id. at 3, ¶ 10. Irving's complaint, therefore, challenges the manner in which Chase and Ritchie conducted the 1975 and 1978 inspections and is phrased broadly enough to

encompass all of the discrete actions the compliance officers took, or failed to take, during those inspections.[17]

At trial, Irving's proof established that the inspectors were negligent, if at all, in failing to inspect the marker/die-out bench assembly. As the court has found, the evidence would not support a finding that the actions of the compliance officers or any other Department of Labor employee were deficient, much less negligent, at any other stage of the 1975 and 1978 inspections or subsequent citation processes. Therefore, it is Chase's and Ritchie's failure to inspect the bench assembly during the 1975 and 1978 inspections that forms the basis of Irving's cause of action and constitutes the "challenged conduct" for the purposes of applying the discretionary function exception.[18]

---

[17] Reading Irving's complaint to allege negligence on the part of the compliance officers in their performance of the several specific actions that constituted the 1975 and 1978 inspections is consistent with a liberal reading of the complaint and is in harmony with the Supreme Court's assessment of the complaints in both Berkovitz and Varig. In Berkovitz the Court read plaintiffs' broad averment of negligent licensing and release of a polio vaccine as alleging negligence at each relevant step of the multistage licensing and release procedures. Berkovitz, 486 U.S. at 539-40, 543-44. Similarly, in Varig Airlines the Court read plaintiff's allegation that the FAA was negligent in failing to inspect certain elements of aircraft design as "necessarily challeng[ing] two aspects of the certification procedure: the FAA's decision to implement the 'spot-check' system of compliance review, and the application of that 'spot-check' system to the particular aircraft involved." Varig Airlines, 467 U.S. at 819.

[18] Because the court has already found that the OSHA compliance officers failed to inspect every operational machine, as required by OSHA policy, this order does not delve into whether each stage of the multi-step inspection and citation process involved a discretionary or mandatory function. Rather, it addresses in depth the only step relevant in light of the evidence presented at trial - the failure to inspect every operational machine. As explained more fully below, whether or not the compliance officers performed other discretionary functions is irrelevant because Irving has not proven that they acted improperly or breached a duty owed Irving at any other point during the inspection and citation process.

With the facts surrounding the 1975 and 1978 inspections found, and the challenged conduct defined, resolution of the discretionary function issue becomes relatively straightforward in light of Berkovitz: the discretionary function exception does not deprive this court of subject matter jurisdiction over Irving's suit because OSHA policy governing the 1975 and 1978 inspections did not give inspecting compliance officers any discretion to not inspect particular operational machines within the Somersworth Shoe facility. Rather, OSHA policy prescribed a definite and mandatory course of action for the compliance officers to follow. They were required to inspect every operational machine in the plant and could not do less; anything less would amount to an unauthorized spot-check of the facility. Having alleged and proven the existence of that mandatory duty, Irving may maintain her suit to the extent it focuses on Chase's and Ritchie's failure to comply with it.[19]

Indeed, this case is strikingly similar to Berkovitz, in which the plaintiff sued the government alleging that the National Institute of Health's Division of Biologic Standards ("DBS") licensed a polio vaccine without first receiving test data on the safety of the vaccine. Applicable statutes and regulations required, as a precondition to licensing, that the DBS receive safety test data on the vaccine from the manufacturer. Because the DBS had no discretion to issue the license without first receiving the test data, the discretionary function exception did not bar the plaintiff's suit. Berkovitz, 486 U.S. at 540-43. Here, Irving has likewise proven that OSHA compliance officers had a duty to inspect every operational machine before they compiled the inspection reports upon which citation decisions were based. She has also proven that the compliance officers did not inspect the

---

[19] At oral argument, the government agreed that such a failure on the part of OSHA inspectors implicates a mandatory duty. Attorney Pyles stated, "If there's a requirement to look at every machine and he does not look at every machine, then I would agree that that's a violation of a mandatory regulation." (Tr. at 111.)

bench assembly before preparing their inspection reports. She may, therefore, maintain her suit challenging the compliance officers' failure to inspect the bench assembly.

In contrast, this case is readily distinguished from Varig Airlines, in which the discretionary function exception did bar suit because FAA inspectors were "specifically empowered" to spot-check aircraft under construction for compliance with FAA regulations. Varig Airlines, 467 U.S. at 820. Here, "the compliance officers were required by OSHA to inspect the entire Somersworth Shoe plant; they could not choose simply to spot check certain areas." Irving I, 909 F.2d at 604.

Although the government concedes that the compliance officers were under a mandatory duty to inspect every operation (Tr. at 107), it points to a number of discretionary functions performed by Chase and Ritchie during the course of the 1975 and 1978 inspections in support of its argument that the discretionary function exception bars Irving's suit entirely. It is undoubtedly true that both Chase and Ritchie did exercise policy-level discretion in performing certain of their assigned duties. For instance, the compliance officers could and did exercise discretion, informed by public policy concerns, when they made determinations regarding whether or not particular workplace conditions presented sufficient risks of employee exposure to justify documenting them as potential violations of OSHA safety standards. Similarly, the Area Director, when classifying violations as de minimis, non-serious, or serious, exercised policy-level discretion.

But while the government's premise is sound — Chase and Ritchie did perform discretionary functions during the 1975 and 1978 inspections — its conclusion that the discretionary function exception bars Irving's suit does not follow. Irving's suit is barred only to the extent it alleges that OSHA employees were negligent in performing any of those discretionary functions. Irving could not, for example, sue the government if OSHA had decided not to inspect the Somersworth Shoe plant at all. Varig Airlines, 467 U.S. at 819-20 ("When an agency determines the extent to which it

will supervise safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind."). She also could not bring an action under the FTCA if OSHA formulated and followed a policy of spot-checking machines and, as a result, failed to find the violative condition leading to her injury. Id. at 820; Berkovitz, 486 U.S. at 546. She likewise could not sue if OSHA left it up to the assigned inspectors to determine how thorough an inspection to conduct. Nor could she sue the government if the compliance officers inspected the bench assembly but wrongly concluded that there was insufficient employee exposure to justify a citation, however gross an abuse of discretion that judgment might have been. Berkovitz, 486 U.S. at 544-45. And she could not sue if OSHA mistakenly categorized a serious violation as de minimis. Id. Each of those situations would involve, at most, an abuse of discretion, but the exercise of discretion nonetheless, and the exercise of discretion is generally immune from scrutiny under the FTCA.

But while the discretionary function exception would bar many, if not most, suits arising from negligent OSHA inspections, it does not bar Irving's suit. This is so because none of the scenarios advanced by the government actually occurred in this case. Instead, Chase and Ritchie failed to inspect the bench assembly at issue despite a mandatory duty to inspect it. Under Berkovitz, Irving may sue the government for that failure.[20]

---

[20] This is not to imply that this is the only conceivable failure on the part of OSHA that could give rise to a cause of action under the FTCA. For instance, if Irving had proved that Chase and Ritchie inspected the bench assembly, noticed the unguarded rotating drive shaft, determined that sufficient employee exposure to the hazard existed, but failed to document the violative condition, Irving could likely maintain a suit against the government for that failure consistent with the discretionary function exception. Similarly, if Irving demonstrated that OSHA actually decided there existed a substantial probability that death or serious physical harm could result from a violative condition, yet refused to issue a citation for that condition, Irving could maintain a suit challenging that

In light of the court's finding that Chase and Ritchie failed to inspect the bench assembly despite a mandatory duty to do so, the government is limited to arguing, in effect, that the fact that the compliance officers performed several other discretionary functions shields their challenged conduct from suit, even though the challenged conduct implicates a mandatory duty. This argument ignores the clear lesson of both Varig Airlines and Berkovitz that the proper inquiry is whether the "challenged conduct . . . is a matter of choice for the acting employee." Berkovitz, 486 U.S. at 536 (emphasis added); see also Varig Airlines, 467 U.S. at 813. While Irving cannot maintain a suit based on the government's failure to properly perform a discretionary function, she may indeed sue for breach of mandatory duties that did, in fact, occur.[21]

Finally, to avoid a decision on the merits of Irving's suit, the government advances another version of the same argument rejected above. The government argues that Irving has not identified any statute, regulation, or policy requiring OSHA compliance officers to "notice" or "find" every safety violation that existed within the four walls of the Somersworth Shoe plant, and, as a result, the discretionary function exception bars any suit alleging that the injury

---

failure. Some actions become mandatory once discretion has actually been exercised.

[21] Of course, in order to succeed on the merits of her Good Samaritan claim, Irving must prove that the compliance officers' failure to inspect the bench assembly breached a duty recognized under state law and was causally related to her injury. The causal chain may include proof that OSHA employees would more likely than not have performed certain actions that are discretionary in character (i.e. classifying the unguarded drive shaft as a violation and citing Somersworth Shoe for that violation). The causal chain may include functions that are discretionary without barring suit over the violation of mandatory duties. This notion is implicit in Berkovitz, 486 U.S. at 544-45, where the Supreme Court allowed a suit in which it was alleged that the DBS licensed a polio vaccine without receiving the required test data; DBS employees would have exercised discretion in making the licensing determination once they received the required test data.

occurred as a result of OSHA's failure to find or cite a violative condition.[22]

Once again, the government's premise is correct: Irving has not proven the existence of a policy requiring Chase and Ritchie to find or notice every safety violation in the facility. The Court of Appeals said in Irving I, 909 F.2d at 604-05, that there is some evidence in the record suggesting the existence of such a duty and perhaps it's a plausible suggestion. For instance, in response to a question by plaintiff's counsel regarding the scope of the 1975 and 1978 inspections, Area Director Amirault stated, "[Y]ou would have to ask the compliance officer exactly how he proceeded, but he should be observing and documenting any violative condition . . . ." (Amirault, 2/12/85, p. 29-30 (emphasis added).) But, while this and similar statements by Amirault could conceivably be interpreted as meaning that OSHA policy required Chase and Ritchie to notice every violation within the plant (a stretch this court is unwilling to make), the vast majority of the evidence presented at trial, including the bulk of Amirault's testimony, establishes that OSHA policy imposed upon the compliance officers only the more realistic duty to document all violations that they did, in fact, notice during their inspections. OSHA policy did not (and as a practical matter could not reasonably) require them to find every single violation that existed in the facility, perfection being more aspirational than achievable. Amirault repeatedly stated that

---

[22] The court addresses this argument separately because both parties have hotly disputed its validity and the First Circuit has twice directed the district court to determine whether there existed a mandatory "duty to find," Irving I, 909 F.2d at 604, or "requir[ement] . . . to notice," Irving II, 49 F.3d at 835, all safety violations within the four walls of the Somersworth Shoe plant. As phrased, the answer to the Court of Appeals's specific question, did "the inspectors [have] policy-level discretion to fail to note and tell the employer about the violation"? Irving II, 49. F.3d at 834, is: The inspecting officers were not mandated or required to find or notice every violation, but were required to report all de minimus, non-serious, and serious violations that they did find.

the inspectors' job was to inspect every operation in the plant and "document any hazardous conditions that they would see." (Amirault, 2/12/85, p. 28 (emphasis added); see also 2/12/85, p. 25, 57, 58, 88-89.) In fact, Amirault nearly always qualified his answers in an attempt to distinguish between the duty to record recognized violations and the duty to notice all violations that existed. (See, e.g., Amirault, 2/12/85, p. 55.) Irving could not, therefore, sue the government under the FTCA for OSHA's mere failure to conduct perfect safety inspections.

For the reasons discussed above, however, the fact that Chase and Ritchie were under no mandatory duty to find every violative condition is neither here nor there. What is important is that they were under a mandatory duty to inspect every operational machine and failed to do so. In fact, it was by inspecting every operational machine that OSHA expected to meet its goal of identifying and eliminating all workplace safety hazards to the extent humanly possible; It makes sense, then, that Irving can maintain her suit for negligent failure to inspect every operational machine, even though she could not bring a cause of action based on Chase's or Ritchie's failure to carry out their inspection of each machine perfectly, had they actually looked at every machine.

Because Irving has proven the existence of a mandatory duty on the part of Chase and Ritchie, and because her suit is based on their failure to carry out that duty, the discretionary function exception to the FTCA does not deprive this court of subject matter jurisdiction over Irving's sole cause of action. With the jurisdictional question resolved, the court now proceeds to consider the merits of Irving's claim under New Hampshire's Good Samaritan doctrine.

III. GOOD SAMARITAN DOCTRINE

Under the FTCA, the United States is liable in tort "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674, "in accordance with the law of the place where the act or

omission occurred." 28 U.S.C. § 1346 (b). The FTCA, then, does not create new causes of action, but, instead, waives sovereign immunity for certain causes of action founded on state law. In fact, "even where specific behavior of federal employees is required by federal statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability." Zabala Clemente v. United States, 567 F.2d 1140, 1149 (lst Cir. 1977), cert. denied, 435 U.S. 1006 (1978). "'[T]he test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred.'" Dorking Genetics v. United States, 76 F.3d 1261, 1266 (2d Cir. 1996) (quoting Rayonier Inc. v. United States, 352 U.S. 315, 319 (1957)) (alteration in Dorking Genetics).

The court must, therefore, first look to the law of New Hampshire to determine whether the United States could be liable for Irving's injuries. Under New Hampshire law, a plaintiff claiming negligence on the part of a defendant must show that: (1) the defendant owed the plaintiff a duty; (2) the defendant breached that duty; (3) the plaintiff suffered an injury; and (4) the defendant's breach of duty was the proximate cause of plaintiff's injury. Ronayne v. State, 137 N.H. 281, 284, 632 A.2d 1210, 1212 (1993).

A. Duty

The threshold inquiry in any negligence action is whether the defendant had a legal duty to defend the plaintiff against injury. Here, Irving relies on the so-called "Good Samaritan" doctrine, as described in the Restatement (Second) of Torts § 324A and recognized by New Hampshire law, as the basis for the government's duty. See Williams v. O'Brien, 140 N.H. 595, 669 A.2d 810 (1995); Walls v. Oxford Management Co., 137 N.H. 653, 659, 633 A.2d 103, 106 (1993); Corson v. Liberty Mut. Ins. Co., 110 N.H. 210, 212-14, 265 A.2d 315, 318-19 (1970); Kirk v. United States,

604 F. Supp. 1474, 1482 (D.N.H. 1985). Section 324A provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A (1965).

In order to establish that the United States owed her a duty of care, therefore, Irving must establish that OSHA undertook to render services to Somersworth Shoe necessary for the protection of Somersworth Shoe's employees, including Irving. Irving must also prove that: (1) OSHA's failure to exercise due care in rendering services increased the risk of harm to her; or (2) OSHA undertook a duty owed by Somersworth Shoe to her; or (3) she suffered harm because of her reliance, or the reliance of Somersworth Shoe, upon OSHA's undertaking.[23]

---

[23] Courts differ as to whether the three disjunctive prongs of the Good Samaritan doctrine are most appropriately viewed as creating defendant's duty to plaintiff or in establishing the requirements of proximate cause. See Blessing v. United States, 447 F. Supp. 1160, 1193 n.51 (E.D. Pa. 1978) (noting the disagreement and stating that Pennsylvania courts construe the three disjunctive requirements of section 324A to state the requirements of proximate cause). This difference in approach is at once understandable and immaterial to the outcome, as the definitions of both duty and proximate cause require the foreseeability that these three prongs guarantee. See Corso v. Merrill, 119 N.H. 647, 651,

"[A]pplication of the 'Good Samaritan' doctrine is at bottom a question of state law . . . ." Varig Airlines, 467 U.S. at 815 n.12. In this case, the task of determining whether the government owed Irving a duty enforceable under the FTCA is simplified greatly by the fact that New Hampshire has already imposed the Good Samaritan duty upon workplace inspectors in a situation that is the precise private analogue to that presented here. In Corson v. Liberty Mutual Ins. Co., 110 N.H. 210, 265 A.2d 315 (1970), the New Hampshire Supreme Court considered "whether a company which undertakes to assist accident prevention by additional inspections and advice rendered to the company primarily charged with the duty can be liable for negligent inspection to an injured employee." Id. at 212. The court answered the question in the affirmative, finding that the relationship between the inspecting and inspected companies could give rise to a duty on the part of the inspecting company to use due care in conducting the inspection. Id. Further, the court considered it "beyond debate that if a duty on the part of the [inspector] were found to have existed, that duty extended to [the injured employee of the inspected company] who was clearly within the orbit of risk which would be created by negligent performance of the duty."[24] Id. at 213.

---

406 A.2d 300, 303 (1979). Both the New Hampshire Supreme Court and the Court of Appeals for the First Circuit have treated these three requirements as prerequisites to establishing that the defendant's duty extends to the plaintiff. See Corson, 110 N.H. at 212-14, 265 A.2d at 318-19; Walls v. Oxford, 137 N.H. at 659, 633 A.2d at 106; Zabala Clemente, 567 F.2d.

[24] The Restatement and Corson present slightly different formulations of the Good Samaritan doctrine. For instance, the "orbit of risk" required by the Corson formulation appears to serve the same function as do the three disjunctive requirements of section 324A of the Restatement — all ensure that the injured third person is a reasonably foreseeable plaintiff, an essential element of establishing the existence of a duty under New Hampshire law. "'The risk reasonably to be perceived defines the duty to be obeyed.'" Corso v. Merrill, 119 N.H. 647, 651, 400 A.2d. 300, 303 (1979) (quoting Palsgraf v. Long Island R.R., 162 N.E. 99,

The reasoning of Corson applies with equal force here, and, under the New Hampshire Supreme Court's interpretation of the Good Samaritan doctrine, the government owed Irving a duty to exercise due care in carrying out its inspection of the Somersworth Shoe plant. First, OSHA undertook to provide precisely the same service considered in Corson and contemplated by section 324A of the Restatement - "to assist accident prevention by additional inspections and advice rendered to the company primarily charged with the duty" to ensure workplace safety.[25] Id. at 212. Area Director Amirault stated that the inspections "provided a lot of assistance to employers" as they strove to meet their obligation to prevent workplace accidents.[26] (Amirault, 2/12/85, p. 47; see also 2/12/85, p. 45-48.)

---

100 (N.Y. 1928)); see also White v. Schnoebelen, 91 N.H. 273, 274-75, 18 A.2d 185 (1941). In this decision, the court will attempt to address the issue of duty in a manner that references both formulations. Of course, to the extent the Corson Good Samaritan doctrine differs substantively from the language of the Restatement, the New Hampshire Supreme Court's interpretation of the doctrine controls.

[25] The obvious similarity between the inspection considered in Corson, which was performed by an insurer, and the inspections performed by OSHA, is underscored by the testimony of Bruce Brooks who stated that he, as an employee of Somersworth Shoe, never distinguished between the private inspectors and OSHA compliance officers who periodically inspected the plant. (Brooks, 2/12/85, Supp. at 15-16.) From his point of view, both types of inspections served the single purpose of identifying and correcting unsafe working conditions.

[26] The government contends that the "punitive" nature of the inspection process requires a finding that the 1975 and 1978 inspections were not "services" within the meaning of New Hampshire's Good Samaritan doctrine. The argument fails on several grounds. First, it ignores the weight of the evidence. Area Director Amirault testified with apparent candor that the inspection process served both to enforce OSHA health and safety standards (an arguably punitive purpose) and to assist employers in improving workplace safety (a decidedly non-punitive end). Second, and more fundamentally, under the Good Samaritan doctrine as applied to the government via the FTCA, "[t]he reason for undertaking the inspection is not important. While the existence of a federal statutory duty as the reason for undertaking the action will not automatically create

The government's duty to use due care in rendering services extends to Irving for the same reason it extended to the plaintiff in Corson: an inspector's failure to act with due care in carrying out a safety inspection can fairly be said to increase the risk of harm by "'cloak[ing] the defect, dull[ing] the call to vigilance, and so aggravat[ing] the danger.'" Corson, 110 N.H. at 214, 265 A.2d at 319 (quoting Marks v. Nambil Realty Co., 245 N.Y. 256, 259, 157 N.E. 129, 130 (1927) (Cardozo, C.J.)). Here, Somersworth Shoe employees and employees of Wood Heel, another shoe company housed in the same building, were aware of the existence, purpose, and scope of the OSHA inspections, as well as the fact that their employers were required to abate any cited violations. (Irving, 2/11/85, p. 37; Gosselin, 2/11/85, p. 87-94; Brooks, 2/12/85, Supp. at 15.) As a result, the inference that negligence on the part of OSHA in performing its inspections increased the risk of harm to Somersworth Shoe employees by dulling their vigilance regarding workplace hazards is a valid one. The compliance officers' oversight did, in fact, "negligently mak[e] matters worse." Rodrigue v. United States, 968 F.2d 1430, 1434 (lst Cir. 1992). Irving is, therefore, a foreseeable plaintiff to whom OSHA owed a duty of reasonable care. See Restatement (Second) of Torts § 324A(a).

OSHA's duty extends to Irving for a second reason not addressed in Corson, but contemplated by section 324A (c) of the Restatement: Somersworth Shoe reasonably relied on OSHA to perform its inspections in a non-negligent manner.

---

liability, neither will such a duty preclude liability." United Scottish Ins. Co. v. United States, 614 F.2d 188, 193-94 (9th Cir. 1979), aff'd in relevant part sub nom. United States v. Varig Airlines, 467 U.S. 797 (1984). Finally, and on a closely related note, the government's argument is tantamount to a suggestion that the government may avoid liability under the FTCA for "uniquely governmental functions" such as enforcement activities in general or regulatory enforcement in particular. The Supreme Court rejected these contentions in Indian Towing Co. v. United States, 350 U.S. 61, 67 (1955), and Berkovitz, 486 U.S. at 538-39, respectively.

See Restatement (Second) of Torts § 324A (c), cmt. e. Roger Couture, foreman of the stock fitting room, gave unrebutted testimony that Somersworth Shoe "actually depend[ed]" on the OSHA inspections to find safety problems that the company had overlooked.[27] (Couture, 2/12/85, Supp. at 7.) Therefore, under the Good Samaritan doctrine, the government owed Irving a duty to exercise due care in conducting its wall-to-wall inspections.

B. Breach

Under the Good Samaritan doctrine, the defendant's duty is created by the "relation between the parties which the service makes." Corson, 110 N.H. at 212, 265 A.2d at 318 (internal quotation marks omitted). The scope of the duty, then, is measured by the extent of the service undertaken by the defendant. See Blessing v. United States, 447 F. Supp. 1160, 1189 (E.D. Pa. 1978). Here, the government undertook to perform wall-to-wall inspections of the Somersworth Shoe plant, inspecting every operational machine in the facility. Therefore, Chase and Ritchie had a duty to exercise due care in carrying out the wall-to-wall inspections. "The test of due care is what reasonable prudence would require under similar

---

[27] The government argues that even if Somersworth Shoe did rely on the OSHA inspections, such reliance was not reasonable because the primary duty to comply with OSHA safety standards remained at all times with Somersworth Shoe and its employees. See 29 U.S.C. § 654. Once again, the government draws a faulty conclusion from a perfectly valid premise. Somersworth Shoe of course retained its own duty to comply with OSHA safety standards. And for this reason, the court finds that OSHA did not "undertake[] to perform a duty owed by [Somersworth Shoe] to [Irving]," as contemplated by section 324A(b) of the Restatement. But the fact that Somersworth Shoe retained its own duty does not mean that it could not reasonably expect OSHA compliance officers to use due care when they acted to assist it in meeting its obligations under the Act. In Corson, the inspecting company owed the inspected company a duty to use due care despite the fact that the inspected company retained primary responsibility for preventing workplace accidents. Corson, 110 N.H. at 212, 265 A.2d at 317-18.

circumstances." Weldy v. Town of Kingston, 128 N.H. 325, 330-31, 514 A.2d 1257, 1260 (1986).

Under the circumstances presented here, a reasonably prudent inspector would have inspected the bench assembly at issue during the 1975 and 1978 OSHA inspections. Both compliance officers were charged with the mandatory duty to inspect every operational machine in the Somersworth Shoe plant. Both officers were taken through the entire plant, including the stock fitting room, by Somersworth Shoe personnel. The marker/die-out bench assembly was located on a main traffic aisle in the stock fitting room and was not blocked or otherwise obscured from view during either inspection. Further, the bench assembly was the type of machine on which both compliance officers had found drive-train violations elsewhere in the plant. The record reveals no basis upon which the court could conclude that a reasonable OSHA inspector charged with the duty to look at every machine could reasonably fail to look at this machine. In light of these facts, Chase's and Ritchie's failure to inspect the bench assembly can only be explained by their failure to exercise due care in carrying out their mandatory duties to conduct wall-to-wall inspections of the Somersworth Shoe facility. The government, therefore, breached the duty of care it owed Irving.[28]

---

[28] Although neither party raised the issue, an argument could be made that OSHA's mandatory policy of inspecting every operational machine itself created the standard of care applicable to Irving's Good Samaritan claim, the violation of which would constitute negligence per se. See Johnson v. Sawyer, 4 F.3d 369, 376-77 (5th Cir. 1993). Because the court finds that Chase and Ritchie breached the ordinary standard of care applicable to normal negligence actions, it need not consider whether the compliance officers' actions also constituted negligence per se.

Because Irving has proven that the government owed and breached a duty under New Hampshire's Good Samaritan doctrine, the government's renewed argument that the misrepresentation exception to the FTCA, 28 U.S.C. § 2680 (h), bars Irving's suit fails. See United States v. Block, 460

C. Harm

Irving has proven beyond any doubt that she suffered grievous harm when she became entangled with the unguarded rotating shaft. The government only contests the economic impact of Irving's injuries, not their existence. Irving's injuries are detailed here and the economic effects of those injuries are discussed below in the context of damages.

Prior to the accident, Irving was a healthy 21-year-old woman. The exposed drive shaft avulsed her scalp, fractured and dislocated her second cervical vertebra, and left her with permanent neurological damage.[29] Immediately after she became entangled in the drive shaft, Irving suffered cardiac and respiratory arrest. When she arrived at Maine Medical Center by ambulance, she was experiencing quadriplegia as a result of her fractured and dislocated vertebra. Following surgery to repair her scalp avulsion, Irving was moved to the intensive care unit ("ICU"), where she was placed in traction to allow her spine to heal without further damaging her spinal cord. (Irving, 2/11/85, p. 17-19.) For a time, Irving was paralyzed from the neck down and could not speak. She had to be fed, bathed, dressed, and groomed by others.

Approximately one month after the accident, Irving was moved from the ICU to in-patient rehabilitative medicine. Once in rehabilitation, Irving was taken out of traction and placed in a "halo," a metal support screwed into her skull for the purpose of immobilizing her head and torso. For over two months, Irving remained in the hospital, slowly relearning how to perform simple tasks such as eating, dressing, walking, and writing. Through remarkable perseverance and

---

U.S. 289 (1983); Irving v. United States, No. C81-501-M (D.N.H. March 13, 1996) (McAuliffe, J.).

[29] Unless otherwise attributed, the findings of fact relating to Irving's injuries are based on Exhibit 23, the videotaped testimony of Eithne C. McCann, M.D. Dr. McCann practices rehabilitative medicine and oversaw Irving's medical treatment following the accident.

courage she steadily regained significant control over many of her motor functions.

When Irving was discharged from the hospital on January 17, 1980, she could move about without the help of others, but required the aid of a wheelchair or crutches. (Ex. Z2, Tri-Area Visiting Nurses Report.) She could feed herself, but needed help with bathing and personal grooming. (Ex. 22, Occupational Therapy Report of Nancy Eastman.) She also needed assistance with most cooking and homemaking tasks. (Id.)

Although Irving's condition improved steadily through years of physical therapy, she was left with permanent and severe neurological damage. Specifically, Dr. McCann diagnosed her as having incomplete Brown Sequard Syndrome and other physical disabilities directly resulting from the injuries she suffered in the accident. None of the disabilities Irving exhibited at the time of trial is likely to abate during her lifetime.

Incomplete Brown Sequard syndrome has left Irving with impaired reflexes and sensation throughout her body, but especially in her toes and hands. Her senses of balance and space are also impaired, causing her to fall occasionally. She is easily fatigued.

Irving also suffers from spasticity that causes her gait to be slow and stiff and also prevents her from moving any part of her body quickly. The spasticity also adversely affects her fine motor functions and causes her hands and arms to spasm from time to time. Dr. McCann estimated that Irving must perform all motor functions at 50% the normal rate of speed. Given these symptoms, Irving has also suffered depression. (Ex. 22, Tri-Area Visiting Nurses Report; Wayne Irving, 2/11/85 p. 115; Irving, 2/11/85, p. 28.)

Dr. McCann estimated that the cumulative effect of these symptoms renders Irving 30% permanently physically disabled. Irving cannot run or jump, has trouble negotiating tight corners and hills on foot, and will never be able to

perform any physical task quickly. On the positive side, she can bathe, dress, and groom herself, and perform most activities of daily living, albeit at a slow pace.

D. Proximate Cause

As the final element of her claim, Irving must show that the government's negligence was a proximate cause of her injuries. Chase's and Ritchie's breach of duty proximately caused Irving's injuries if their breach was "a substantial factor in bringing about the harm." Weldy, 128 N.H. at 332, 514 A.2d at 1261 (quoting Maxfield v. Maxfield, 102 N.H. 101, 105, 151 A.2d 226, 230 (1959)). "When determining whether a negligent act was a substantial factor in bringing about an injury, a court must determine both whether the negligence in fact caused the injury and whether the injury was reasonably foreseeable." Clement v. United States, 980 F.2d 48, 53 (lst Cir. 1992) (interpreting Maine tort law); see also Weldy, 128 N.H. at 332, 514 A.2d at 1261 (incorporating both cause-in-fact and foreseeable result inquiries into the substantial factor test); Maxfield, 102 N.H. at 105, 151 A.2d at 230 (same).

1. Cause-in-Fact

"Causation-in-fact is, by definition, a factual inquiry which requires a court to determine if an injury would not have occurred but for a defendant's negligence." Clement, 980 F.2d at 54. As the New Hampshire Supreme Court has put it, "It is like a connecting bridge between the negligence and the harm that gives rise to the cause of action." White v. Schnoebelen, 91 N.H. 273, 275, 18 A.2d 185 (1941). Considering a case in which the alleged causal connection was somewhat attenuated, the court expanded upon the same metaphor:

> Usually the bridge is so short as to be crossed in a matter of . . . moments. . . . A long lapse of time may make difficult or even impossible proof that the bridge of causation is unbroken, but if it appears on the balance of probabilities to be intact, it will

> bear the necessary weight of conveying negligence to harm so that the two may merge into a cause of action.

Id. (discussing cause-in-fact in the context of statute of limitations) (emphasis added). Here, too, the causal bridge is long and (remaining faithful to the metaphor) is composed of many separate sections. But Irving has overcome the difficulties inherent in proving the requisite causal connection and has demonstrated by a preponderance of the evidence that but for the negligence of Chase and Ritchie, she would not have suffered the injuries that she did.

Irving has proved by a preponderance of the evidence each critical event in the causal connection between Chase's and Ritchie's negligence and her injury. If Chase or Ritchie had inspected the bench assembly as they were required to do, they would certainly have noticed the unguarded rotating shaft. It would have been blatantly obvious to any trained OSHA inspector. (Chase, 2/12/85, p. 110, 112, 119, 128, 134; Amirault, 2/12/85, p. 66.)

Had either compliance officer observed the exposed shaft during his inspection, he would certainly have documented it as a violation of the OSHA safety standards that require drive mechanisms to be guarded. This finding is supported by several pieces of evidence. First, both Chase and Ritchie documented several similar workplace conditions as OSHA safety violations during the 1975 and 1978 inspections. (Ex. 8, OSHA Compliance Worksheet at 3; Ex. 9, OSHA Worksheet at 7-9.) Second, Chase himself all but admitted that, had he seen the unguarded rotating drive shaft on the bench assembly, he would have recognized and documented it as a violation. (Chase, 2/12/85, p. 110, 112, 119, 128, 134.) Third, Area Director Amirault stated that an ordinary safety inspector observing the unguarded shaft would have determined it to be a safety violation. (Amirault, 2/12/85, p. 67.) Finally, O'Connell readily determined that the unguarded shaft was a blatant violation of OSHA safety

standards when he observed it during his post-accident inspection. (O'Connell, 2/12/85, p. 158-59.)

If either Chase or Ritchie had documented the shaft as a violation, Somersworth Shoe would have been informed of the violation in two separate ways. First, both compliance officers held closing conferences with Somersworth Shoe representatives in which they discussed all potential violations identified during their respective inspections. (Ex. 8, OSHA Narrative at ¶ 12; Ex. 9, OSHA Narrative at ¶ 8, 20.) Second, Area Director Amirault would have cited the bench assembly as a serious (or at least a non-serious) violation of 29 C.F.R. § 1910.219 (c) (2) (ii) and issued that citation to Somersworth Shoe. The most direct evidence of this is that OSHA did, in fact, cite the shaft as a serious violation of OSHA safety standards following the post-accident inspection. (Ex. 10, Citation and Notification of Penalty at 1.) In addition, given the fact that the 1975 and 1978 inspections both led to the issuance of non-serious citations for similarly unguarded drive mechanisms (Ex. 8, Citation at 2; Ex. 9, Citation and Notification of Penalty at 12), it is more likely than not that Somersworth Shoe would have been issued a citation for the unguarded rotating drive shaft on the bench assembly in 1975 and in 1978 had the inspectors looked at the machine.

Had Somersworth Shoe been notified that the drive shaft was in violation of OSHA safety standards, the company would almost certainly have abated the violation in a timely manner. In their respective closing conferences in 1975 and 1978, the compliance officers discussed abatement with Somersworth Shoe representatives. (Ex. 8, OSHA Narrative at ¶ 12.) In addition, formal citation would have triggered a mandatory abatement process. (Amirault, 2/12/85, p. 34.) Somersworth Shoe's policy was to abate all cited violations within the period set by OSHA.[30] (Couture, 2/12/85, Supp. at

---

[30] On the other hand, but equally compelling, the evidence also indicates that, absent a finding by an OSHA compliance officer that a machine was in violation of safety standards, Somersworth Shoe was

6, 11.) And all pertinent evidence introduced at trial shows that the company did, in fact, timely abate all violations cited during the 1975 and 1978 inspections.[31] (Chase, 2/12/85, p. 140; Ritchie, 2/12/85, p. 152; O'Connell, 2/12/85, p. 162; 2/13/85, p. 9; Amirault, 2/12/85, p. 84.) The consistency and promptness with which Somersworth Shoe abated all other OSHA violations for which it was cited leads the court to conclude that the company would have guarded the drive shaft on the bench assembly if the shaft had been found by OSHA to be in violation of safety standards.

Finally, had Somersworth Shoe installed a stationary casing or trough on all four sides of the drive shaft as required by 29 C.F.R. § 1910.219 (c) (2) (ii), Irving would likely not have been entangled in the shaft and seriously injured. (See O'Connell, 2/12/85, p. 160 (stating that the regulation required the drive shaft to be guarded on all four sides).) Professor Igor Paul gave unrebutted testimony that Irving's accident could not have occurred if the shaft had been guarded as required, and the court so finds. (Paul, 2/14/85, p. 23-24.) The relevant physics confirms Dr. Paul's opinion. Had a guard been in place, the vacuum effect created by the high velocity would likely not have drawn Irving's hair toward the spinning shaft. And, even if her hair had come near the shaft, the guard would have prevented it from becoming entangled.

---

reluctant to abate apparent hazards. For instance, before Irving's accident, Rothwell told the company that the drive shaft on the die-out machine was unguarded. Yet, Somersworth Shoe declined to remedy the situation until OSHA cited the shaft. (Rothwell, 2/12/85, p. 14-17.) This underscores the extent to which (being perhaps overly charitable) Somersworth Shoe relied on the specialized knowledge of OSHA compliance officers, but in any event it shows how directly employee safety was related to OSHA inspections.

[31] Shortly after Irving's accident, Gino Ruscitti, the plant manager, displayed to O'Connell a very uncooperative attitude regarding abatement of the unguarded drive shaft. (O'Connell, 2/13/85, p. 10, 32.) But, in spite of its initial defensive attitude, Somersworth Shoe did proceed to guard the shaft within the abatement period set by OSHA.

The causal connection in this case is indeed long, both temporally and in the number of steps it incorporates, but at each critical step Irving has carried her burden of proof. The court finds therefore, that but for the negligence of Chase and/or Ritchie,[32] Irving would not have suffered the injuries of which she complains.

2. Foreseeable Result

As a final prerequisite to proving proximate cause, Irving must demonstrate that her injury was the reasonably foreseeable result of the government's negligence. "An injury is reasonably foreseeable when a defendant's negligent conduct 'creates a risk that might reasonably be expected to result in such injury or damage, even though the exact nature of the injury or damage need not, itself, be foreseeable.'" Clement, 980 F.2d at 54 (quoting Fowler v. Boise Cascade Corp., 948 F.2d 49, 53 (lst Cir. 1991)); see also LeFavor v. Ford, 135 N.H. 311, 315, 604 A.2d 570, 573 (1992); Weldy, 128 N.H. at 332, 514 A.2d at 1261; Maxfield, 102 N.H. at 105, 151 A.2d at 230.

Here, the risk of employee injury was clearly a foreseeable result of the compliance officers' negligence. The declared purpose of the Act is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651. Congress sought to effect this purpose by, among other things, "providing for the development and promulgation of occupational safety and health standards," 29 U.S.C. § 651 (b)(9), and "by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection." 29 U.S.C. § 651(b)(10). The ultimate purpose of Chase's and Ritchie's inspections was,

---

[32] Because both Chase and Ritchie were employees of the defendant, the court need not determine which of the compliance officers was primarily responsible for Irving's injuries. Nor need the court determine whether Ritchie's negligence in the 1978 inspection breaks the bridge of causation from the 1975 inspection to the injury.

therefore, to prevent workplace injuries like those Irving suffered.

The fact that both Somersworth Shoe and its employees also had a duty to comply with OSHA safety standards does not render Irving's injuries unforeseeable to a reasonable compliance officer. This is particularly true in light of the fact that Somersworth Shoe had no full-time safety staff or safety training program, a fact of which Ritchie, at least, was aware. (Ritchie, 2/12/85, p. 151.) And both compliance officers knew that the Somersworth Shoe plant contained numerous safety violations despite the employer's independent duty to eliminate them. It was reasonably foreseeable that Somersworth Shoe would not guard the drive shaft absent OSHA intervention.[33] While Somersworth Shoe's failure to guard the drive shaft may indicate that it, too, could be liable for Irving's injuries, it does not render the government, the sole defendant in this action, less liable in tort for the foreseeable results of its own negligent acts.

E. Comparative Fault

Unable to effectively place sole responsibility for Irving's injuries on Somersworth Shoe, the government argues that its liability to Irving is eliminated or substantially discounted by her own comparative fault. New Hampshire's current comparative fault statute, N.H. Rev. Stat. Ann. ("RSA") § 507:7-d (Supp. 1994), does not apply to this case because the cause of action arose before July 1, 1986, the effective date of the statute. Rather, Irving's case is governed by RSA 507:7-a, New Hampshire's original comparative fault statute, repealed in 1986 but applicable to claims arising between 1970 and 1986. See Hewes v. Roby, 135 N.H. 476, 478, 606 A.2d 810, 811 (1992).

---

[33] Although the government does not explicitly argue that Somersworth Shoe's failure to guard the shaft on its own initiative was a superseding, intervening cause, the court here rejects such an argument by holding that both the company's failure to guard the shaft absent citation and Irving's injuries were reasonably foreseeable.

Section 507:7-a stated:

> Contributory negligence shall not bar recovery in an action by any plaintiff, or his legal representative, to recover damages for negligence resulting in death, personal injury, or property damage, if such negligence was not greater than the causal negligence of the defendant, but the damages awarded shall be diminished, by general verdict, in proportion to the amount of negligence attributed to the plaintiff . . . The burden of proof as to the existence or amount of causal negligence alleged to be attributable to a party shall rest upon the party making such allegation.

N.H. Rev. Stat. Ann. § 507:7-a (repealed 1986) (emphasis added). The government contends that it has met its burden of proving by a preponderance of the evidence that in reaching down to retrieve her glove Irving failed to conduct herself as an ordinary prudent person would under similar circumstances.

At the heart of the government's comparative negligence claim is the argument that Irving crawled underneath the bench assembly in order to retrieve her glove even though she knew or should have known of the obvious danger posed by the drive mechanism located there. The court has already, implicitly at least, rejected the notion that Irving actually crawled underneath the bench to pick up her glove. To the contrary, when Irving bent over in the narrow aisle between the bench assembly and the die rack, the vacuum created by the rotating shaft drew her hair into contact with it. In light of the testimony by Irving and Dr. Paul regarding the chain of events immediately preceding the accident (Irving, 2/11/85, p. 12; Paul 2/14/85, p. 29), the mere fact that the shaft was located approximately 16 inches in from the rear edge of the bench is not sufficient to support a finding that Irving actually crawled underneath the bench.

Similarly, Irving cannot be charged with either actual or constructive knowledge of the dangerous condition that the

unguarded shaft created. The government acknowledges, as it must, that Irving was not actually aware of the existence of the shaft. (See Irving, 2/11/85, p. 39.) While she was aware that the die-out machine located next to the manually powered marker machine on which she worked was powered by an electric motor, Irving cannot fairly be charged with knowledge that the drive mechanism for the die-out machine consisted of a long shaft running along the length of the back of the bench assembly and rotating with sufficient velocity to create a vacuum capable of drawing hair or clothing to it. She was a factory worker, not a mechanical engineer or a trained safety professional. She cannot fairly be charged with the knowledge that the unguarded shaft posed a significant danger to her if she bent down in an aisle in which workers were expected to be to pick up a glove.

Irving's stooping to retrieve her glove does not constitute failure to exercise due care under these circumstances.[34] Accordingly, the government is legally responsible for the injuries Irving suffered and is liable for the full amount of damages she incurred as a result of those injuries.

F. Damages[35]

"The usual rule of compensatory damages in tort cases requires that the person wronged receive a sum of money that

---

[34] The government does not argue that Irving was comparatively negligent because she wore her hair long and failed to wear some type of hat. However, this argument, too, would likely fail. At the time of the accident, Irving was working on a manually powered machine; Somersworth Shoe policy did not, therefore, impose clothing or hair restrictions upon her. Gosselin, 2/11/85, p. 94; Rothwell, 2/12/85, p. 12.) Nor did the government present any evidence that, had Irving worn her hair in a different manner, the accident would not have occurred. The government, therefore, has not met its burden of proving causal comparative negligence on Irving's part, as required by RSA 507:7-a.

[35] In assessing damages, the court has before it only the evidence presented at the original trial on February 14, 1985. It is that date, therefore, that separates past from future damages.

will restore [her] as nearly as possible to the position [s]he would have been in if the wrong had not been committed." Smith v. Cote, 128 N.H. 231, 243, 513 A.2d 341, 348 (1986). In awarding damages, the court may consider: (1) the reasonable value of medical care incurred and likely to be incurred in the future; (2) lost wages — past, present, and future — including the lost value of services provided in the home; and (3) reasonable compensation for pain, discomfort, and distress suffered, including the loss of capacity to enjoy life. See New Hampshire Civil Jury Instructions § 9.2 (1989) (citing Restatement (Second) of Torts § 924 (1965)).

At trial Irving presented unrebutted evidence that her past medical and other treatment-related expenses totaled $84,469.88. (Ex. 13, Summary of Medical Expenses; Ex. 12, Medical Bills.) Those expenses were necessarily incurred in the course of treating her injuries. She also presented an unchallenged estimate of $22,399.80 in future medical expenses likely to be incurred. (Ex. 13, Summary of Medical Expenses.) The court finds Irving's estimate of future expenses to be well within reason. If anything, it is conservative, taking into account only future medications. Therefore, the court finds the reasonable cost of medical care incurred and likely to be incurred to be $106,869.68.

In support of her claim for lost wages, Irving offered the expert testimony of Charles C. McGoldrick, Jr. McGoldrick had considerable experience in vocational rehabilitation, vocational evaluation, and vocational placement of industrially-injured workers. (McGoldrick, 2/13/85, p. 3-7.) He also had graduate level training in statistics and research design techniques. (Id.) However, McGoldrick was not an economist. The court has taken into account McGoldrick's relative experience in these several fields of study in drawing conclusions from his testimony.

Because Irving has been continuously employed only since February 1984 her claimed lost wages fall into two convenient temporal categories. The first runs from October 1979 until February 1984; the second runs from February

1984 through the end of her expected working life. For nearly the entire period from October 1979 until February 1984, Irving was unable to find work as the direct result of neurological damage she suffered in the accident.[36] (Irving, 2/11/85, p. 49; Ex. 15, Vocational Report at 3-4; Ex. 23, Videotaped Testimony of Dr. McCann; McGoldrick, 2/13/85, p. 17.) Irving remained unemployed throughout this period despite repeated, good-faith attempts to find work through a number of specialized placement agencies and firms, including the New Hampshire Division of Vocational Rehabilitation, Comprehensive Rehabilitation Associates, and the Job Placement Office of MacIntosh College. (Ex. 15, Vocational Report at 15.)

At the time of the accident, Irving was a high-school graduate with some vocational training who was earning just above the minimum wage for her work at Somersworth Shoe. (McGoldrick, 2/13/85, p. 19.) Assuming that Irving had remained employed at the minimum wage from October 1979 until February 1984, McGoldrick estimated her lost wages during that period to be $27,974.[37] (Ex. 15, Vocational Report at 4; McGoldrick, 2/13/85, p. 18.) McGoldrick also provided an alternate estimate based on the assumption that Irving, an experienced shoe-factory worker, would have earned $6.00 per hour, rather than the minimum wage, during the period between October 1979 and February 1984. Irving's estimated

---

[36] The single, short exception occurred in the summer of 1983 when Irving held a job at a telephone answering service for less than two months. However, her inability to write at the fast pace required by the job prevented her from performing satisfactorily, and she was forced to look for work more suited to her physical limitations.

[37] This estimate is adjusted to take into account the wages Irving actually earned during her two months at the answering service. In estimating all lost wages, McGoldrick utilized the "total offset" method, that is, he assumed wage growth and inflation would perfectly offset one another. He did not, therefore, utilize the discount method of calculating present value.

lost wages for that period under that assumed wage total $51,886.

Although there is some evidence in the record to indicate that but for the accident Irving was capable of earning considerably more that the minimum wage between October 1979 and February 1984 (see McGoldrick, 2/13/85, p. 19, 32), there is insufficient evidence to support the conclusion that she would have regularly earned $6.00 per hour throughout that period. Irving would, more likely than not, have earned more than the minimum wage. In fact, she was earning slightly above the minimum wage at the time of the accident. But it is also likely that, given the cyclical and unpredictable nature of the shoe manufacturing business and Irving's past work experience, she would have been unemployed for portions of the period between October 1979 and February 1984. (See McGoldrick, 2/13/85, p. 33.) Taking all of these factors into account, the court finds Irving's lost wages for the period from October 1979 until February 1984 to be $28,000.

As of the trial on the merits in February 1985, Irving had been employed for one year as a secretary and receptionist by the Internal Revenue Service ("IRS") through a federal program that gives hiring preference to individuals with physical disabilities. (Ex. 15, Vocational Report; McGoldrick, 2/13/85, p. 21; Irving, 2/11/85, p. 50.) As a result of her physical disabilities, Irving works at approximately 60% of normal capacity in that job. (McGoldrick, 2/13/85, p. 15-16.) Although she will likely continue to be employed at the IRS throughout her working life, Irving's disabilities render it unlikely that she will be promoted beyond her current position. (McGoldrick, 2/13/85, p. 16.) Irving's limitations also prevent her from successfully competing in the wider labor market without the aid of preferential treatment. (McGoldrick, 2/13/85, p. 17.) Irving earns $5.50 per hour at the IRS.

Assuming that but for the accident Irving would have earned an average of $6.00 per hour throughout her working life, McGoldrick estimated Irving's past and future lost wages

beginning in February 1984 to be $43,293. Although it was unrealistic to expect Irving to earn as much as $6.00 per hour by 1984, it is quite reasonable, probably conservative, to conclude that Irving would have earned an average of $6.00 per hour during her expected working life. Taking all of the relevant factors into account, including the probability that Irving would likely have experienced periods of unemployment during her working life, McGoldrick's estimate of $43,293 is reasonable and supported by the evidence. On the other hand, his alternate estimate of $203,840 in lost wages after February 1984, based on an average lost wage of $8.00 per hour, is not persuasive and not supported by the evidence. The court finds the total reasonable value of Irving's lost wages — past, present, and future — to be $71,293.

The court must also take into account the value of services Irving cannot perform in the home as the result of the accident. Based on testimony that went essentially unchallenged by the government, McGoldrick estimated that Irving would have performed work in the home valued at $322,187 from October 1979 until the expected end of her life if the accident had not occurred. He then estimated that as a result of the accident Irving is only able to perform 20% of that work. Based on these estimates, he calculated the value of lost work around the home to be $257,750. (McGoldrick, 2/13/85, p. 27; Ex. 15, Vocational Report.)

The court finds McGoldrick's estimate of Irving's capacity to perform work around the home to be overly pessimistic. The medical evidence established that Irving is able to perform most tasks, but at half normal speed, and she is the type of person likely to persevere despite the obstacles in her path. Assessing Irving a more appropriate 50% disability regarding tasks performed around the home, the work lost in the home is reasonably valued at $161,000.

Finally, the court must tackle the always difficult task of assigning a dollar value to Irving's pain, suffering, and diminished capacity to enjoy life. "[C]onverting feelings such

as pain, suffering, and mental anguish into dollars is not an exact science," Correa v. Hospital San Francisco, 69 F.3d 1184, 1197 (lst Cir. 1995), cert. denied, 116 S.Ct. 1423 (1996), and it "is particularly difficult to estimate upon a mere examination of the record." Anthony v. G.M.D. Airline Servs. Inc., 17 F.3d 490, 495 (lst Cir. 1994). Nonetheless, the court must award appropriate, full and fair money damages in an effort to make the plaintiff whole, to the limited extent money can compensate for such losses.

Irving's experience was undeniably traumatic. Describing the accident, Irving stated, "I remember getting pulled in and a feeling of choking. And then it was - went all black and my ears like started buzzing and I remember thinking this is what it's like to die. I thought I was dead." (Irving, 2/11/85, p. 14.) After the accident, Irving endured painful treatment, including surgery to repair her torn scalp, full body traction, and a metal halo screwed into her skull. Even after surgery and rehabilitation, she was left with the daily discomfort of increased muscle spasticity and occasional muscle spasms. While no amount of money can ever assuage the suffering she has endured and will endure, fair and full compensation as best as it can be approximated must be awarded. Fair compensation for the pain and suffering Irving endured and will endure as a direct result of the accident is $400,000.

By far the most serious single deprivation Irving has suffered is a diminished capacity to enjoy life. Prior to the accident, Irving was a healthy, active person who enjoyed physical activities of all sorts. (Loubier, 2/11/85, p. 72.) Today, Irving can engage in few of the physical activities that once gave her pleasure. She cannot perform tasks that require much manual dexterity. Simple activities like running and jumping are impossible for her. Even walking in a normal fashion takes considerable effort. She must perform at half-speed those physical activities in which she can engage, and her condition decreases the amount of energy she can expend in any single day. All of these effects of the accident substantially diminish Irving's capacity to enjoy life and none

of them is likely to abate. Taking all of these factors into account, fair compensation for Irving's lost capacity to enjoy life is $500,000.

In her original administrative claim, filed with the Department of Labor on November 25, 1980, Irving requested money damages in the amount of $1,000,000. The FTCA provides that, with limited exceptions, "[a]ction under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency." 28 U.S.C. § 2675 (b). Consistent with that statute, the ad damnum clause of Irving's complaint requested money damages of $1,000,000. Nearly fifteen years after filing her complaint, Irving moved this court to increase her ad damnum to an amount in excess of the amount she sought in her administrative complaint arguing, inter alia, that the extraordinary delay in resolving this litigation, and attendant economic inflation, justified increasing the requested award. This court previously acknowledged that economic inflation has reduced the real value of the award Irving requested in her original complaint. Nonetheless, the court was constrained to deny Irving's motion to increase her ad damnum, Irving v. United States, No. C81-501-M, slip op. (D.N.H. March 13, 1996) (McAuliffe, J.), because such a request is, in fact if not in name, a request for pre-judgment interest in light of the Supreme Court's decision in Library of Congress v. Shaw, 478 U.S. 310, 321-22 (1986). The FTCA, 28 U.S.C. § 2674, specifically preserves the government's sovereign immunity from awards of prejudgment interest. So, although Irving has proved damages in excess of $1,000,000, the court's ability to award damages is limited by the ad damnum clause of her complaint.[38] Accordingly, judgment shall be entered in favor of Irving in the amount of $1,000,000.

---

[38] The court recognizes that Irving has been materially prejudiced by several unusually long delays, all of which were entirely attributable to the court and its workload and none of which were attributable to the litigants. The prejudice arises from the fact that the court's findings regarding the

SO ORDERED.

/s/
Steven J. McAuliffe
United States District Judge

August 29, 1996

cc: Phyllis Jackson Pyles, Esq.
Gretchen Leah Witt, Esq.
Paul R. Cox, Esq.

---

amount of damages proven are necessarily expressed in 1996 dollars, while the administrative claim cap on the damages award is of course expressed in more valuable 1979 dollars, and cannot be converted to 1996 dollars to take into account inflationary effects. See Library of Congress, 478 U.S. at 322. (It follows that if the court's findings as to damages were expressed in 1979 dollars, the amount of damages proven would of course fall below the one million dollar amount demanded in the administrative claim.)

If it were to have any practical remedial effect, the court, following the maxim "actus curiae neminem gravabit," would exercise its equitable power to enter judgment nunc pro tunc as of February 14, 1987 - a date that would account for a reasonable time under the conditions then prevailing for decision after the case was submitted to the court on February 14, 1985. See Mitchell v. Overman, 103 U.S. 62, 64-65 (1881) (stating that it is the court's "duty" to enter judgment nunc pro tunc when a party is prejudiced by unreasonable delay attributable to "the multiplicity or press of business" before the court). However, the government has waived its sovereign immunity from awards of post-judgment interest "only when the judgment becomes final after review on appeal or petition by the United States Government, and then only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance." 31 U.S.C. § 1304 (b) (1) (A); see also Andrulonis v. United States, 26 F.3d 1224, 1230-31 (2d Cir. 1994). As a result, giving retroactive effect to the court's judgment alone would not result in recovery of post-judgment interest from the effective date of the judgment and would not, therefore, benefit Irving in any tangible respect. Perhaps plaintiff may yet obtain complete equitable relief from the Executive and/or Legislative Branches of government.

F-1

Gail Merchant IRVING,
Plaintiff, Appellant,

v.

UNITED STATES of America,
Defendant, Appellee.

No. 94-1848.

United States Court of Appeals,
First Circuit.

Heard Feb. 9, 1995.

Decided March 16, 1995.

Paul R. Cox, with whom Jennifer A. Rosenfeld and Burns, Bryant, Hinchey, Cox & Rockefeller, P.A., Dover, NH, were on brief, for appellant.

Phyllis Jackson Pyles, Asst. Director, Torts Branch, Civ. Div., Dept. of Justice, Washington, DC, with whom Paul M. Gagnon, U.S. Atty., Concord, NH, Frank Hunger, Asst. Atty. Gen., and Jeffrey Axelrad, Director, Torts Branch, Civ. Div., Dept. of Justice, Washington, DC, were on brief, for appellee.

Before SELYA, Circuit Judge, BOWNES, Senior Circuit Judge, and STAHL, Circuit Judge.

BOWNES, Senior Circuit Judge.

This appeal requires us to decide, for a third time, whether the district court correctly decided this Federal Tort Claims Act ("FTCA") suit in favor of the government. Once again, we are of the opinion that the district court's ruling is not sustainable. We therefore vacate the judgment and remand this matter for further proceedings. We also direct that the proceedings take place before a different district court judge.

I.

On October 10, 1979, while working at the Somersworth Shoe Company plant in Somersworth, New Hampshire, plaintiff appellant Gail Merchant Irving sustained severe injuries when her hair became entangled in the unguarded rotating shaft of a die-out machine located next to her work station. The accident occurred when plaintiff bent over to pick up a glove she had dropped near the machine.

On October 7, 1981, plaintiff filed suit against the United States under the FTCA. She claimed that inspectors from the Occupational Safety and Health Administration ("OSHA") had twice negligently failed to notice a dangerous condition which was an undisputedly serious violation of OSHA safety standards — i.e., that the rotating shaft on the die-out machine was unguarded. Her theory of liability was that Somersworth would have corrected the dangerous condition prior to her accident had it been given notice of the violation during *either* of the two inspections. The inspections at issue took place in 1975 and 1978.

From the beginning, the government has argued that the district court lacked subject matter jurisdiction over this case because the actions of the OSHA inspectors were protected by the "discretionary function" exception to the FTCA's waiver of sovereign immunity. *See* 28 U.S.C. § 2680(a); *see also Iriving v. United States*, 909 F. 2d 598, 600 (1st Cir. 1990) (because discretionary function exception, effectively reinstates sovereign immunity, cases falling within it are dismissed for lack of subject matter jurisdiction) ("*Irving* I"). Section 2680 (a) exempts from the FTCA's waiver.

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function on duty on the part of a federal agency or an employee of the

Government, whether or not the discretion involved be abused.

The government's initial challenge to the district court's subject matter jurisdiction was presented in a motion to dismiss. On February 22, 1982, the court denied the motion. *See* 532 F.Supp. 840 (D.N.H. 1982). Prior to trial, but after the Supreme Court handed down an opinion elaborating upon the scope of the discretionary function exception, *see United States v. Varig Airlines*, 467 U.S. 797, 104 S. Ct. 2755, 81 L.Ed.2d 660 (1984), the government renewed its motion to dismiss. On August 8, 1984, the district court denied this second motion.

A bench trial on the merits of plaintiff's claim began on February 11, 1985, and concluded on February 14, 1985. For nearly three years, the district court had the matter under advisement. Finally, on January 27, 1988, the court dismissed the suit without reaching the merits. The court, citing intervening circuit authority, reversed its earlier rulings to the contrary effect and concluded that the discretionary function exception applied to the OSHA inspections.

The court's dismissal order came shortly before the Supreme Court decided *Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988). On plaintiff's initial appeal, we vacated the dismissal and remanded the matter for further consideration in light of *Berkovitz*. *Irving v. United States*, 867 F.2d 606 (1st Cir. 1988) (unpublished order). We directed:

> On remand . . . the district court should first consider whether, viewing the evidence in the light most favorable to the appellant, its decision to dismiss remains correct after *Berkovitz*. A determination by the district court that its initial decision does not survive *Berkovitz* does not, of course, preclude a later finding of immunity based upon the court's factual findings. If the district court ultimately finds that the OSHA employees had discretion in conducting their inspection and that the

> discretion involved considerations of policy, it should grant the government immunity.

Id., slip op. at 3-4.

The district court did not follow our instructions. It did not discuss whether, in light of *Berkovitz*, plaintiff's allegations were sufficient to state a claim falling outside the discretionary function exception. Nor did it analyze whether plaintiff's proof was sufficient to sustain her allegations. Instead, the court simply compared the facts here with the facts of a then-recent, post-*Berkovitz* OSHA case in which the Fifth Circuit had found the discretionary function exception to apply, *see Galvin v. OSHA*, 860 F.2d 181 (5th Cir. 1988), and ruled that the suit was within the scope of the exception.

Plaintiff again appealed, and again prevailed on appeal. *See Irving* I, 909, F.2d at 605. We pointed out that, under *Berkovitz*, the discretionary function exception applies "only if the challenged action 'is a matter of choice *for the acting employee*', and '*if the action challenged in the case* involves the permissible exercise of policy judgment.'" *Id.* at 601 (quoting *Berkovitz*, 486 U.S. at 536, 537, 108 S.Ct. at 1958, 1959). Applying this rule, we first found plaintiff's allegation that OSHA policy *required* the inspectors to notice the violation at issue here adequate to state a claim that the discretionary function exception did not apply. *Id.* at 601-03 (analyzing pertinent case law). We next assessed the evidence and concluded that it was sufficient for a finding in plaintiff's favor on the discretionary function question. *Id.* at 603-05. We therefore vacated and remanded for a second time. In so doing, we stated:

> [A]n issue of fact lingers in the record: whether OSHA policy left the thoroughness of inspections a matter of choice for its compliance officers. There is some evidence, viewed in the light most favorable to the plaintiff, that the thoroughness of inspections was not left up to the individual compliance officers, and that the compliance officers did not have policy-level discretion

> to fail to note and tell the employer about the violation which allegedly was the cause of Ms. Irving's injuries. The district court should have made findings resolving this issue, in conformity with the directions of this court on the earlier appeal.

Id. at 605. Our opinion issued on July 25, 1990.

For nearly four years, the district court did not respond to the second remand. Finally, on June 27, 1994, the court issued a memorandum opinion. Once again, the court declined to follow our mandate, Instead, it addressed the merits of plaintiff's claim. After reviewing its trial notes and a partial transcript of the 1985 trial, the court found that, at the time of the 1975 and 1978 OSHA inspections, the die-out machine was "some two feet closer to the wall to its rear" than it was on the day of plaintiff's accident. This finding led the court to conclude that the offending rotating shaft was permissibly "guarded by location" — i.e., that "it was then in such a location that employees working near it would not be exposed to injury" — at the time of the OSHA inspections. As the court explained, "[The machine's] nearness to the wall to its rear would prevent access and probable injury." Accordingly, the court found that no negligent act or omission on the part of any OSHA employee occurred during the 1975 and 1978 inspections. In the court's view, this finding obviated any need to resolve the discretionary function question. Judgment was entered for the government.

II.

On appeal, plaintiff makes two arguments. First, she contends that the district court's guarded-by-location finding is clearly erroneous, and/or predicated upon errors of law. Second, she asserts that "the undue delay of nine and one-third years between the bench trial and the final decision on the merits rendered the court's findings of fact unreliable and also violated the plaintiff's right to access to the courts, due process, and fundamental fairness as guaranteed by the United States Constitution." For its part, the government renews its

argument that the actions of the OSHA inspectors fell within the FTCA's discretionary function exception.

Because the government's argument puts the district court's subject matter jurisdiction into issue, we begin with the last of the three appellate arguments.

A. The Discretionary Function Exception

It is axiomatic that, "in a multi-panel circuit, newly constituted panels, generally speaking, are bound by prior decisions on point" *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth.*, 991 F.2d 935, 939 n.3 (1st Cir.1993). This rule does not apply, however, when the decision is subsequently undercut by controlling authority — e.g., a Supreme Court opinion, an *en-banc* opinion of the circuit court, or a statutory overruling. *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth.*, 945 F.2d 10, 12 (1st Cir. 1991), *rev'd on other grounds*, ___ U.S.___, 113 S. Ct. 684, 121 L.Ed.2d. 605 (1993). Nor does it apply in those rare situations "where newly emergent authority, although not directly controlling, nevertheless offers a convincing reason for believing that the earlier panel, in light of the neoteric developments, would change its course." *Id.*

The government does not dispute that, under ordinary circumstances, we would be precluded from reexamining whether the discretionary function exception applies here. After all, the panel in *Irving I* gave the question careful and exhaustive consideration, and concluded that it could not be resolved without further fact finding. *Irving I*, 909 F.2d at 605. Instead, the government argues: (1) that the factual findings made by the district court in the June 27, 1994 memorandum opinion are sufficient to resolve the outstanding factual issues noted in *Irving I*; and (2) that the Supreme Court's decision in *United States v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267, 113 L.Ed.2d 335 (1991), which was handed down after *Irving I*, offers convincing reasons to believe that the panel in *Irving I* would have ruled differently had it had

the benefit of the *Gaubert* opinion. We disagree with both contentions.

The *Irving I* panel ruled that the applicability of the discretionary function exception could not be decided without findings as to whether OSHA *policy* left the thoroughness of inspections a matter of choice for individual inspectors, and whether the inspectors had policy-level discretion to fail to note and tell the employer about the violation which allegedly caused plaintiff's injuries. 909 F.2d at 605. The government relies on certain "findings" in the district court's June 27, 1994 memorandum opinion. These findings were: that the OSH *Act* and its implementing *regulations* do not themselves provide standards to guide inspectors in the exercise of their authority to search; that there is no *statute* or *regulation* requiring OSHA to ensure that all machines in every workplace are properly guarded; that the OSHA Field Operations Manual recognizes that inspections may vary considerably in scope and detail, depending upon the circumstances in each case; and that it is a judgment call whether a certain machine is in violation of OSHA standards. We do not think that these findings address the concerns noted in *Irving I*.

The *Irving I* panel explicitly acknowledged that if "the statute and the formal regulations [were] the only standards guiding the compliance officer's conduct, the discretionary function exception would apply". *Id.* at 603. The question in this case, however, revolves around OSHA *policy* — as opposed to the statute and formal regulations — in 1975 and 1978. *Id.* The referenced findings in no way speak to OSHA policy during these two years. Similarly, while the OSHA Field Operations Manual notes that inspections may vary considerably in scope and detail, it does not indicate that the *individual inspectors* were themselves to decide on the scope and detail of each inspection. And the general statement that it is a judgement call whether a certain machine is in violation of OSHA standards is not, when read in context, a finding at all. It is, rather, a reiteration of the testimony of Francis

Amirault, who was the Area Director of OSHA at all times relevant to this litigation. The *Irving I* panel was well aware of this testimony, and did not view it as dispositive. *See id.* at 604-05. For reasons explained more fully below, we are not free to revisit this conclusion. *See Metcalf & Eddy*, 991 F.2d at 939 n. 3.

As to the assertion regarding *Gaubert* we note that the government has not attempted to explain how *Gaubert* renders *Irving I* incorrect or obsolete. Ordinarily, this would lead us to conclude that the argument is waived. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.) ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"), *cert. denied*, 494 U.S. 1082, 110 S. Ct. 1814, 108 L.ED.2d 944 (1990). Because the question implicates the district court's subject matter jurisdiction, however, we have independently analyzed whether *Gaubert* offers a convincing reason for concluding that the *Irving I* panel would change its course. *See Metcalf & Eddy*, 945 F.2d at 12. We discern no such reason.

Gaubert was concerned primarily with correcting the lower court's misperception that operational or management decisions cannot be policy decisions protected by the discretionary function exception. *See* 499 U.S. at 325-26, 111 S.Ct. at 1275. No such misperception is apparent in *Irving I*. Moreover, *Gaubert* explicitly reaffirmed the legal basis on which the holding in *Irving I* was constructed: that "the requirement of judgment or choice is not satisfied if a 'federal statute, regulation or *policy* specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" *Gaubert*, 499 U.S. at 322, 111 S.Ct. at 1273 (emphasis supplied) (quoting *Berkovitz*, 486 U.S. at 536, 108 S.Ct. at 1958-59). Applying this rule, the panel in *Irving I* first noted plaintiff's allegation that OSHA had a policy *requiring* its inspectors to notice safety violations within the four walls of the inspected plant. 909 F.2d at 603. The panel then found that there was sufficient evidence in the record for a rational fact finder to

credit this allegation, and held that the discretionary function question could not be answered until the trial court decided whether or not to credit the allegation. *Id.* at 603-05. There is nothing new in *Gaubert* that calls this analysis into question. We therefore see no reason to conclude that the panel would have decided *Irving I* any differently had *Gaubert* been previously issued.

The discretionary function doctrine is fraught with difficulty, and the Supreme Court or Congress may some day decide that the analysis in *Irving I* is incorrect. Unless and until that day arrives, however, or unless and until we revisit the question as an *en banc* court, *Irving I* remains binding on all newly constituted panels in this Circuit. Accordingly, we reject the government's argument that the discretionary function question can be decided in its favor without further fact finding.

B. The Guarded-by-Location Finding

In reviewing a factual finding made by a district judge in connection with a bench trial, we almost always apply the clear-error standard of review. *See* Fed.R.Civ. P. 52(a). Under this standard, we give the finding effect unless we are "'left with the definite and firm conviction that a mistake has been committed.'" *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)). Thus, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.*

Of course, the deference mandated by Rule 52(a) has its limits. For example, the Rule clearly presumes that a sustainable finding will be based upon properly admitted evidence. And the Supreme Court has indicated that if a reviewing court is firmly convinced that a finding is mistaken, it should reverse the finding *even where* there is evidence to

support it. *See Anderson*, 470 U.S. at 573, 105 S.Ct. at 1511; *United States Gypsum*, 333 U.S. at 395, 68 S.Ct. at 542.

Here, the court reached its conclusion that the rotating shaft of the die-out machine was guarded by location at the time of the 1975 and 1978 OSHA inspections by analyzing the inspections separately. With regard to the 1975 inspection, the court's finding was premised on a subsidiary finding that "[p]rior to the spring of 1977, the offending machine had been positioned some two feet closer to the wall to its rear. Between that date and the spring of 1979, it had been moved forward to the position it occupied at the time of the plaintiff's accident." As the basis for so finding, the court stated: "The evidence as to the prior location of the 'die-out' machine came from the testimony of Robert [sic][1] Couture." In rejecting plaintiff's request that it reconsider the finding, the court elaborated:

> Although [Couture's] testimony was not transcribed, the court, as is its custom, took contemporaneous trial notes of the testimony of each witness. Mr. Couture's testimony was therein recorded. In light of such testimony, the court credited that testimony over the testimony of Igor Paul that Mr. Paul was of the opinion that the machine had not been moved.[2]

---

[1] The first name of Couture, who was foreman of the stock fitting room (the room in which the die-out machine was located) at the time of the 1975 and 1978 inspections, is Roger.

[2] The expert testimony of Paul, which was based upon his examination of the accident site, was not the only evidence that the die-out machine's rotating shaft was not guarded by location at the time of the 1975 inspection. It is undisputed that, at this time, a rack with die and pattern slots going down to the floor was positioned against the wall behind the machine. It also is undisputed that employees could not access the dies and patterns in these slots if there were no space between the machine and the rack. This, of course, gives rise to an inference that, in 1975, there was an aisle wide enough for one to bend over in between the machine and the rear wall. The trial court made no mention of this evidence in its findings of fact.

The transcript of Couture's actual testimony, which has been provided to this court on appeal, reveals serious errors in the district court's trial notes.

First, Couture did not testify that the die-out machine had been moved; he testified that "it *might* have been moved." Second, Couture did not testify that the machine had been moved two feet; he testified that it *might* have been moved "one *or* two feet."[3] And third, Couture did not testify that the machine had been moved between the spring of 1977 and the spring of 1979; he testified that he "really [did not] remember" when any movement might have taken place.

To be sure, there was evidence in the record tending to support the district court's finding. This "evidence", however, was hearsay testimony of OSHA compliance officer O'Connell regarding statements Couture allegedly made a few days prior to trial. On redirect examination by plaintiff's counsel, O'Connell testified that, just before trial, Couture told him that the machine had been moved two feet at some point in the two years preceding the spring of 1979. In light of Couture's testimony *at trial* (which was inconsistent with O'Connell's), the probative value of O'Connell's testimony is open to serious question. And much more importantly, the district court does not appear to have relied upon O'Connell's testimony in finding that the rotating shaft was guarded by location at the time of the 1975 inspection.

In the end, we have little confidence in the trial court's finding regarding the 1975 inspection. The court fundamentally misconstrued the testimony upon which it

---

[3] The only evidence in the record that the rotating shaft would have been guarded by location had it been differently situated at the time of the inspections came in the form of testimony by Paul O'Connell, an OSHA compliance officer who did a post-accident inspection of the plant. O'Connell testified that the shaft "very likely" would have been guarded by location if the bench upon which the die-out machine sat "had been two feet closer" to the wall. There is no evidence that the shaft would have been guarded by location if it had been one foot closer to the wall.

explicitly and exclusively relied in making the finding. Moreover, the nine and one-third-year delay between trial and the finding significantly undercuts the reason for presuming that the trial court was in a superior position to judge the demeanor and credibility of the relevant witnesses. *Cf. Williams v. Poulos*, 11 F.3d 271, 278 (1st Cir. 1993). Thus, even though the record evidence is inconclusive as to location, we set aside the finding that the die-out machine's rotating shaft was guarded by location at the time of the 1975 inspection.

Having made this determination, we do not need to decide any of the other issues in this case. This means that we need not determine whether: (1) the district court's patently erroneous reliance upon deposition testimony which had not been read into the record at trial, *see Secretary of Labor v. DeSisto*, 929 F.2d 789, 796-97 (1st Cir. 1991) (documents attached to summary judgment motions are not evidence unless admitted at trial), requires reversal of the finding that the rotating shaft was guarded by location in 1978; (2) the court erroneously failed to give plaintiff the benefit of a favorable state law principle — i.e., that a prior or subsequent location "is evidential of a later or earlier one," *see Dube v. Bickford*, 92 N.H. 362, 31 A.2d 64, 66 (1943); or (3) the delay in deciding this case was so substantial that it deprived plaintiff of her constitutional rights.

Plaintiff's theory of liability was that Somersworth would have guarded the rotating shaft had it been informed of the dangerous condition in 1975 *or* 1978. The court rejected this claim on the basis of its findings that the rotating shaft was, in fact, guarded by location in 1975 and 1978. The defective finding that the shaft was guarded by location in 1975 was therefore necessary to the court's entry of judgment in favor of the government. For this reason alone, the judgment cannot stand.

III.

There still remains the question of relief. If this were an ordinary case, we would remand the matter to the trial court for further proceedings consistent with our opinion. Obviously, this has not been an ordinary case for quite some time. Thus, despite the difficulties inherent in retrying a case which was tried over ten years ago, and which arises out of injuries suffered more than fourteen years ago, we think fundamental fairness dictates that plaintiff be granted her request for a trial *de novo* before a different district court judge. No finding from the previous trial should be given preclusive effect in the new trial, and the government is free to renew its argument that the 'inspectors' actions fell within the discretionary function exception, as well as its argument that the machine was guarded by location during the period when the OSHA inspections occurred. We commit to the new judge's discretion the question whether to proceed solely on the current record.

For the reasons stated above, the judgment of the district court is ***vacated***. This matter is ***remanded*** to a different district court judge for further proceedings consistent with this opinion. Plaintiff is entitled to her costs.

G-1

Gail Merchant IRVING,
Plaintiff, Appellant,

v.

UNITED STATES of America,
Defendant, Appellee.

No. 89-1365.

United States Court of Appeals,
First Circuit.

Heard Sept. 15, 1989.

Decided July 25, 1990.

James H. Schulte, with whom Paul R. Cox and Burns, Bryant, Hinchey, Cox & Schulte, P.A., were on brief for plaintiff, appellant.

Phyllis Jackson Pyles, Torts Branch, Civ. Div., Dept. of Justice, with whom Stuart E. Schiffer, Acting Asst. Atty. Gen., Washington, D.C., Richard V. Wiebusch, U.S. Atty., Manchester, N.H., and Jeffrey Axelrad, Torts Branch, Civ. Div., Dept. of Justice, Washington, D.C., were on brief for the U.S.

Before BOWNES and BREYER, Circuit Judges and FAIRCHILD,* Senior Circuit Judge.

FAIRCHILD, Senior Circuit Judge.

The plaintiff's suit alleges that she was injured at work because Occupational Safety and Health Administration (OSHA) inspectors twice negligently failed to notice a dangerous condition which was a serious violation of OSHA

---

* Of the Seventh Circuit, sitting by designation.

safety standards. The question on appeal is whether this suit falls within the discretionary function exception to the United States' waiver of sovereign immunity in the Federal Tort Claims Act (FTCA).

I.

Gail Merchant Irving (then Gail Merchant) worked at Somersworth Shoe company plant in Somersworth, New Hampshire. On October 10, 1979, she was operating a hand-powered marking machine. Apparently, after walking to the opposite side of her work bench and bending under it to retrieve something she had dropped, her hair became caught in the unguarded rotating drive shaft of a nearby machine, causing severe injuries.

Twice prior to Ms. Irving's injury, in 1975 and 1978, OSHA inspectors (also called "compliance officers") had conducted general inspections of the Somersworth Shoe manufacturing plant. While various violations of OSHA standards were noted during these inspections, neither inspector noted any problems with the area around Ms. Irving's work station. Following the accident, OSHA conducted a third inspection, determined that failing to guard the rotating drive shaft which injured Ms. Irving was a serious violation of OSHA standards, and fined the employer. Ms. Irving claims the dangerous condition had existed for years. Appellant's brief at 4.

Ms. Irving had sued the United States under the FTCA. Her theory is that under similar circumstances, the law of New Hampshire would impose liability upon a person who undertook to inspect the plant for safety and was negligent in failing to observe the danger and bring it to the attention of the employer. *See Corson v. Liberty Mutual Insurance Company*, 110 N.H. 210, 265 A.2d 315 (1970) (insurance company which undertook periodic inspections of workplace of insured could be held liable to injured employee for negligent inspections); Restatement (Second) of Torts § 324A(b) (1965). As part of its defense, the United States

relies upon the FTCA's discretionary function exception. 28 U.S.C. §2680(a).

In 1988, after trial, the district court dismissed the suit. Without reaching the merits, the court decided that the discretionary function exception applied to the OSHA inspections. This decision came shortly before the Supreme Court decided *Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988). On plaintiff's appeal, this court vacated the dismissal and remanded for further consideration in light of *Berkovitz*. *Irving v. United States*, No. 88-1454 (1st Cir. Dec. 7, 1988) (unpublished order) [867 F.2d 606]. We directed:

> On remand . . . the district court should first consider whether, viewing the evidence in the light most favorable to the appellant, its decision to dismiss remains correct after Berkovitz. A determination by the district court that its initial decision does not survive Berkovitz does not of course preclude a later finding of immunity based upon the court's factual findings. If the district court ultimately finds that the OSHA employees had discretion in conducting their inspection and that the discretion involved considerations of policy, it should grant the government immunity.

Id., slip op. at 3-4. The district court again dismissed the action without analysis of the evidence, citing the then recent decision of the Fifth Circuit, *Galvin v. OSHA*, 860 F.2d 181 (5th Cir. 1988). Plaintiff appealed.

II.

The FTCA is a broad waiver of sovereign immunity, granting district courts jurisdiction to hear tort suits against the United States for damages caused by its employees acting in the scope of their duties, where the United States, if a private person, would be liable under the law of the place where the tort occurred. 28 U.S.C. §§ 2674; 1346(b). Among

the fourteen statutory exceptions to this waiver of immunity is 28 U.S.C. § 2680(a) which exempts

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Section 2680 "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. Varig Airlines*, 467 U.S. 797, 808, 104 S.Ct. 2755, 2761, 81 L.Ed.2d 660 (1984). Because § 2680(a) is a limitation on the waiver of sovereign immunity, cases which fall within the discretionary function exception are dismissed for lack of subject matter jurisdiction. *See* 28 U.S.C. § 1346(b); *Wright v. United States*, 719 F.2d 1032, 1034 (9th Cir. 1983); *Baird v. United States*, 653 F.2d 437, 440 (10th Cir. 1981), *cert. denied* 454 U.S. 1144, 102 S.Ct. 1004, 71 L.Ed.2d 296 (1982).

Two recent unanimous Supreme Court decisions, *Varig Airlines* and *Berkovitz*, in attempting to clarify the scope of § 2680(a), have set forth a number of principles. "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary exception applies in a given case." *Varig Airlines*, 467 U.S. at 813, 104 S.Ct. at 2764. The Supreme Court has emphatically rejected the assertion that "the exception precludes liability for any and all acts arising out of the regulatory programs of federal agencies." *Berkovitz*, 486 U.S. at 538, 108 S.Ct. at 1960. Instead, the inquiry focuses on the permissible range of action available to the government employee allegedly at fault. "In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice *for the acting employee*." *Id.* at 536,

108 S.Ct. at 1958 (emphasis added). "[I]f the act simply does not involve the exercise of [policy] judgment," or if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," § 2680(a) does not apply. *Id.* at 546-47, 536, 108 S.Ct., at 1964, 1958. Even when the challenged action is the product of an employee's permissible use of judgment, a suit is barred only if that judgment "is of the kind that the discretionary function exception was designed to shield. The basis for the discretionary function exception was Congress' desire to 'prevent judicial "second guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'" *Id.* at 536-37, 108 S.Ct. at 1959 (quoting *Varig Airlines*, 467 U.S. at 814, 104 S.Ct. at 2764).

Varig Airlines involved two lawsuits challenging the Federal Aviation Administration's certification for commercial use of two airplanes which later caught fire in flight. The Court held that the discretionary function exception applied because the two challenged agency actions — the FAA's general decision to spot-check airplane manufacturers' self-inspections rather than fully inspecting every plane, and the spot-check inspectors' specific decisions to certify the two airplanes as safe — were taken within a statutory and regulatory milieu leaving both the agency and its spot-check inspectors room to make policy decisions. 467 U.S. at 819-20, 104 S.Ct. at 2767-68. On the other hand, the Court held that the exception did not apply in *Berkovitz*, a suit challenging the government's licensing of a vaccine lab, and the Food and Drug Administration's approval of a specific batch of vaccine made at that lab — at least insofar as the plaintiff's complaint alleged that the government employees had failed to follow mandatory statutes, regulations, or agency policy which did not allow for employee choices grounded in policy. 486 U.S. at 539-48, 108 S.Ct. at 1960-61.

III.

The government emphasizes the broad statement in *Varig Airlines* that "[w]hatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." 467 U.S. at 813-14, 104 S.Ct. at 2764-65. Government's brief at 15. The government in particular points out that one of the two cases consolidated for review in *Varig Airlines* did not just involve the agency's decision on what types of inspection to conduct, but also included allegations that agency inspectors had in fact inspected the airplane, and had done so negligently. *See United Scottish Ins. Co. v. United States*, 614 F.2d 188, 190 (9th Cir. 1979). Thus, the government argues, *Varig Airlines* holds that the discretionary function exception bars claims based on the negligence of agency inspectors carrying out inspections.

Varig Airlines, viewed in light of the subsequent unanimous decision in *Berkovitz*, does not provide any such broad immunity for negligent agency inspections. First, the government's argument is really just a variant of the one the Supreme Court pointedly rejected in *Berkovitz* — that the United States is immune from suit under the FTCA for injuries caused by the negligent performance of an agency function merely because the inspectors work for a regulatory agency. *Berkovitz*, 486 U.S. at 538, 108 S.Ct. at 1960. Other courts have recently read *Varig Airlines* more narrowly, allowing suits for negligent inspection by government employees. *Ayala v. Joy Mfg. Co.*, 877 F.2d 846 (10th Cir. 1989); *Camozzi v. Roland/Miller & Hope Consulting Group*, 866 F.2d 287, 289 (9th Cir. 1989); *McMichael v. United States*, 856 F.2d 1026 (8th Cir. 1988). *See Patterson v. United States*, 856 F.2d 670 (4th Cir. 1988) *vacated on reh'g en banc*, 881 F.2d 127 (*see* n. 3, below). *Berkovitz* made clear that the discretionary function exception applies only if the challenged action "is a matter of choice *for the acting employee*" and "if *the action challenged in the case* involves

the permissible exercise of policy judgment." 486 U.S. at 536, 537, 108 S.Ct. at 1958, 1959 (emphasis added). Second, while *United Scottish* did include allegations of inspector negligence, the Supreme Court decision in *Varig Airlines* turned on the fact that the FAA inspectors possessed authority to make policy decisions during their spot-check inspections, and that the allegations of negligence involved the deliberate use of this power:

> The FAA employees who conducted compliance reviews of the aircraft involved in this case were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources. In administering the "spot-check" program, these FAA engineers and inspectors necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals. Under such circumstances, the FAA's alleged negligence in failing to check certain specific items in the course of certificating a particular aircraft falls squarely within the discretionary function exception of § 2680(a).

467 U.S. at 820, 104 S.Ct. at 2767. This is how the Court in *Berkovitz* chose to read *Varig Airlines*: "[T]he Court held the challenged acts protected from liability because they were within the range of choice accorded by federal policy and law and were the results of policy determinations." 486 U.S. at 538, 108 S.Ct. at 1959. Ms. Irving claims (with some support in the record) that OSHA's policy on "general inspections" kept any similar discretionary authority from the compliance officers. Assuming an ultimate finding to that effect, the result will be controlled by the plain statement in *Berkovitz* that if an agency's "policy leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not involve the exercise of such judgment, the

discretionary function exception does not bar a claim that the act was negligent or wrongful." *Berkovitz*, 486 U.S. at 546-47, 108 S.Ct. at 1964.

Recent cases from other circuits support our conclusion that after *Berkovitz* the proper inquiry must center on the amount of discretion actually held and exercised by the government employee whose actions or omissions are at issue. For example, the Eighth Circuit, relying on *Berkovitz*, has held that while the Defense Department's decision to entrust an explosive manufacturer with the primary responsibility of ensuring that it complied with safety regulations fell within the discretionary function exception, the exception did not apply to claims resulting from the Defense Department inspectors' failure to follow Department policy: "In the case before us, as in *Berkovitz*, the initial discretion granted by the regulations to the Defense Department was broad; the inspectors, however, violated the Department's own policy directives by failing to comply with specific procedures mandated by the Defense Department." *McMichael*, 856 F.2d at 1033.[1]

Similarly, the Tenth Circuit reversed (also explicitly in light of *Berkovitz*) the dismissal of a suit which alleged that a Mine Safety Health Administration (MSHA) inspector had negligently inspected the lighting system of a coal mine. *Ayala*, above. The court concluded that § 2680(a) did not preclude a claim which did not challenge "the initial 'broad discretion' given the MSHA inspectors to regulate mines," but rather claimed the individual inspector provided improper

---

[1] In contrast, the pre-*Berkovitz* cases cited by the government, holding that claims of negligent inspection are within §2680(a), did not inquire into the individual inspector's discretionary authority, but rather looked at the agency's discretion concerning inspections as a whole. See Russell v. United States, 763 F.2d 786, 787 (10th Cir. 1985); Merklin v. United States, 788 F.2d 172, 174-75 (3d Cir. 1986); General Public Utilities Corp. v. United States, 745 F.2d 239, 243-44 (3d Cir. 1984), cert. Denied 469 U.S. 1228, 105 S.Ct. 1227, 84 L.Ed.2d 365 (1985).

"technical assistance" in violation of federal safety regulations. 877 F.2d at 848-49.[2]

Most recently, the Ninth Circuit noted that the National Park Service's selection of signs *could* be immune from attack under the discretionary function exception, if it "reflect[s] a thoughtful compromise between the need to warn the public of all the associated dangers . . . and the relevant aesthetic considerations." *Summers v. United States*, 894 F.2d 325, 328 (9th Cir. 1990). But when the Park Service "failed altogether to consider the danger to barefoot visitors from hot coals at the time it designed the fire-ring sign," this was not "the product of a choice 'rooted in social, economic, or political policy.'" *Id.* (quoting *Arizona Maintenance Co. v. United States*, 864 F.2d 1497, 1504 (9th Cir. 1989).

There is nothing in *Dube v. Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989) or *Ayer v. United States*, 902 F.2d 1038 (1st Cir. 1990), recent decisions of this court involving the FTCA, which governs the result in the case before us. We do note the court's statement in *Dube* that where the government is involved in regulating private conduct and protecting the public from danger, "the government's failure to consider whether to undertake a greater level of care generally remains within the exception." 870 F.2d at 798. The claim in this case, however, is not that OSHA chose an

---

[2] *See also Camozzi*, above. In *Camozzi*, the United States Postal Service contracted with a general contractor, Roebbelen Co. to construct a post office, but by contract reserved the right to approve Roebbelen's safety plan and make daily safety inspections. The district court dismissed the suits of two injured construction workers who alleged USPS negligently performed the safety obligations it had not imposed on Roebbelen. The Ninth Circuit reversed, holding that properly characterized, the plaintiffs' suits fell outside § 2680(a). "[P]laintiffs do not contend their injuries arose from the fact USPS contracted with Roebbelen for the performance of safety functions during construction. Plaintiffs also disavow reliance on USPS's approval of Roebbelen's safety plan. They rely...upon the alleged negligence of USPS in discharging...[its] authority to police Roebbelen's compliance with safety standards." 866 F.2d at 289.

insufficient level of care in conducting inspections, but that OSHA compliance officers negligently failed to meet the level of care OSHA had set.

IV.

The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, created OSHA and gave it a broad mandate to improve workplace safety. The Act gives OSHA expansive authority to set mandatory safety and health standards for employers, to inspect workplaces to ensure compliance, and to issue citations and levy penalties for violations of its standards. §§ 651(b)(3); 657; 658. While the agency "shall with reasonable promptness issue a citation to the employer" when it believes a violation of an OSHA standard has occurred, § 658(a), the statute does not mandate where, when, or how OSHA is to conduct the inspections it is authorized to make. Likewise, formal regulations give OSHA Area Directors or inspectors the power to decide where and when to make inspections, and give the individual compliance officers discretion to decide how to conduct the inspections. *See* 29 C.F.R. § 1903.7(a) & (b).

Were the statute and the formal regulations the only standards guiding the compliance officer's conduct, the discretionary function exception would apply. Ms. Irving claims, however, that the record in this case (developed during a full trial on the merits) shows that there was an OSHA policy for the 1975 and 1978 inspections which left the compliance officers with no policy-level discretion. She claims the inspections were "general inspections," and that OSHA policy required the compliance officer to "observe and record any violations of OSHA standards that existed within the four walls of the plant and to do a complete and thorough inspection." Appellant's brief at 3. Missing the violative condition which injured her was not within the inspectors' permissible scope of discretion, she argues, or at least was not the permissible result of a choice founded on economic, social, or political policy. The government, on the other hand,

reads the record as proving that the inspectors were charged with no more than making "a walk-through inspection of the plant to document and identify any hazardous condition *which they observed*," and that in conducting the inspections, the compliance officers were free to exercise considerable policy discretion. Government's brief at 4, 39-45 (emphasis added).

The governing statute and formal regulations give OSHA wide freedom at higher agency levels to make decisions and formulate programs concerning the inspection of workplaces. It does not follow, as the government seems to argue, that an employee who performs an inspection has the type and breadth of discretion which makes the inspection a discretionary function. We think *Berkovitz* requires that a court look at the range of choice the agency delegates to the employee who performs the task in question. *See McMichael*, above (an inspector's discretion to choose among corrective actions when a violation is found is not within the discretionary function exception when the inspector has explicit directions on how to respond to the violation at issue).[3]

The District Court did not analyze the evidence and made no findings concerning OSHA's policy in conducting its "general inspections," the degree of discretion allowed the compliance officers, or whether such discretion as existed was grounded in social, economic or political policy. Instead, the

---

[3] *Cf. Patterson v. United States*, 856 F.2d 670 (4th Cir. 1988). In *Patterson*, the plaintiffs alleged that an Office of Surface Mining (OSM) field inspector had negligently inspected an underground fire near their home. The original Fourth Circuit panel held the discretionary function exception did not apply because under OSM "Standard Operating Procedure," the field inspector had no policy-making authority concerning what to do during the inspection. On rehearing, the full court held that even though the inspector may have gone outside his mandatory instructions in making the inspection, the OSM still retained, and used, policy-level discretion when it decided that the fire did not present an emergency situation requiring the expenditure of money. *Patterson v. United States*, 881 F.2d 127, 128 (4th Cir. 1989).

court simply relied upon the Fifth Circuit's decision in *Galvin*, which asserted that the discretionary function exception would have prevented the court from hearing a suit against the United States for OSHA's alleged failure to inspect or negligent failure to detect a dangerous condition, notwithstanding *Berkovitz*, because OSHA itself had violated no mandatory statute or regulation. 860 F.2d at 185. But unlike this case, there was apparently no argument in *Galvin* (or the other cases relied on by the district court[4]) that an agency policy imposed a standard with which the inspectors negligently failed to comply. For this same reason, Ms. Irving's complaint differs from the one other case decided after *Berkovitz* which has held OSHA inspections protected by § 2680(a), *Judy v. U.S. Dept. of Labor*, 864 F.2d 83, 84 (8th Cir. 1988).

It seems clear from the record on appeal that the compliance officers were under certain mandatory directions. By regulation, they were required informally to advise the employer at the end of the inspection of any apparent safety or health violations discovered, and to inform the affected employees and employer "[w]henever and as soon as" the compliance officer concluded that an imminent danger from an unsafe condition exists. 29 C.F.R. § 1903.13. It had already been decided that the Somersworth shoe factory was to be given a "general inspection". But the parties dispute both how much discretion the OSHA compliance officers retained in deciding whether or not to call a condition a violation, and in how thoroughly they were required and able to do the inspection.

---

[4] *Cunningham v. United States*, 786 F.2d 1445 (9th Cir. 1986); *Cordeiro v. Brock*, 698 F.Supp 373 (D.Mass 1988); *Silva v. Brock*, 677 F.Supp.55 (D.Mass 1988).

The record contains OSHA's Field Operating Manual for 1981.[5] The Manual says that a compliance officer's "primary responsibility is the conduct of effective inspections to determine whether employers are: (1) complying with safety . . . standards and regulations . . . and (2) furnishing places of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to their employees." Field Operating Manual at V-1. While the Manual goes on to say that "the conduct of effective inspections requires identification, professional evaluation, and accurate reporting of safety and health conditions and practices," it also says "Inspections may vary considerably in scope and detail, depending upon the circumstances in each case." *Id.*

It does seem undisputed that the compliance officers were required by OSHA to inspect the entire Somersworth Shoe plant; they could not choose simply to spot check certain areas. Richard Amirault, the OSHA Area Director in New Hampshire, testified that "As far as humanly possible, [the compliance officers] were supposed to cover the work place," to "look at every operation," and "to observe any place where an employee works." Tr. At 25, 30.[6]

Mr. Amirault repeatedly testified that the compliance officers were required only to report the violations they saw — "If we could spot the unsafe condition, it should be cited," — which seems to imply the inspectors were under no mandate to find all violations. Tr. At 88-89. *See also* Tr. at 28, 55. But he also testified that the inspectors "should be observing and documenting any violative condition." *Id.* At 30. The inspectors "were supposed to make a complete walk-through and identify and document any hazardous conditions that they would see." *Id.* At 28. A lot of the decisions whether

---

[5] The manual in evidence contains revised language. The government has not told us whether the revisions are significant, or how the earlier version(s) in use in 1975 and 1978 read.

[6] All references to the transcript are to that for February 12, 1985.

or not a condition violated an OSHA standard were "judgment calls." *Id.* At 31. The compliance officer who actually conducted the 1975 inspection of the Somersworth Shoe Plant testified that "I made a complete inspection of the facility *as I am required to do* and made notes, et cetera, of everything that I observed." Tr. at 133-34 (emphasis added). He also said that if in 1975 the machine was the same as it was when Ms. Irving was injured, there was "no way" he would have missed the violation. *Id.* At 110-13. The inference could be drawn that rather than being a judgment call, a violation of the type which caused Ms. Irving's injury was so obvious that failure to report it was not within a compliance officer's discretion. (A different inference could also be drawn, *i.e.*, that the violation at issue was not present at the time of the 1975 inspection — which goes to the merits of Ms. Irving's claim.)

In addition, the record does not indicate how much time the compliance officers had available to conduct their inspections. While there is nothing in the record to suggest that the failure to report this particular violation resulted from time constraints, the rationing of limited inspection resources is an important discretionary function, and hence a decision to limit time for inspection would have to be taken into account in at least two ways. First any statement of policy to the effect that compliance officers should make "complete" or "effective" inspections must be read in light of any limitation on the limited time available to conduct such inspections. The more rigid the time constraints imposed on inspectors, the more likely they will be forced to exercise discretion with respect to the thoroughness of the inspections. Second, if the merits be reached, any inquiry into whether the officer was negligent in failing to discover a violation must consider the standard of reasonable care in the context of a policy decision to limit the time available to inspect. In this case, the 1975 inspection took from 8:00 a.m. to 3:00 p.m, but the record does not show who decided how long the inspection would take, and on what grounds. Tr. at 143. The record does not show how long the 1978 inspection took.

Thus, an issue of fact lingers in the evidence of record: whether OSHA policy left the thoroughness of inspections a matter of choice for its compliance officers. There is some evidence, viewed in the light most favorable to the plaintiff, that the thoroughness of inspections was not left up to the individual compliance officers, and that the compliance officers did not have policy-level discretion to fail to note and tell the employer about the violation which allegedly was the cause of Ms. Irving's injuries. The district court should have made findings resolving this issue, in conformity with the directions of this court on the earlier appeal. Accordingly, the judgment appealed from is vacated, and the case remanded for proceedings consistent with this opinion.

Supreme Court, U.S.
FILED
JUL 23 1999
OFFICE OF THE CLERK

No. 98-1805

In the Supreme Court of the United States

GAIL MERCHANT IRVING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

MARK STERN
PETER R. MAIER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the *sua sponte* grant of rehearing en banc exceeded the authority of the court of appeals.

2. Whether the court of appeals erred in concluding that the actions of Occupational Safety and Health Administration inspectors in conducting workplace safety inspections were within the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680 (1994 & Supp. III 1997).

3. Whether the court of appeals abused its discretion in considering *sua sponte* whether petitioner's claims were barred by the discretionary function exception, when the government had not pressed the issue on appeal from the final judgment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Appley Bros. v. *United States*, 164 F.3d 1164 (8th Cir. 1999)	12
Bender v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986)	12
Berkovitz v. *United States*, 486 U.S. 531 (1988)	2, 9, 10
Block v. *Neal*, 460 U.S. 289 (1983)	13
Calderon v. *Thompson*, 523 U.S. 538 (1998)	7, 8
Cohen v. *United States*, 151 F.3d 1338 (11th Cir. 1998), cert. denied, 119 S. Ct. 1803 (1999)	12
Cunningham v. *United States*, 786 F.2d 1445 (9th Cir. 1986)	10
Daniels v. *United States*, 967 F.2d 1463 (10th Cir. 1992)	10
Galvin v. *United States*, 860 F.2d 181 (5th Cir. 1988)	10
General Dynamics Corp. v. *United States*, 139 F.3d 1280 (9th Cir. 1998)	12
Good v. *Ohio Edison Co.*, 149 F.3d 413 (6th Cir. 1998)	12
Hawaii Hous. Auth. v. *Midkiff*, 463 U.S. 1323 (1983)	7, 8
Indian Towing Co. v. *United States*, 350 U.S. 61 (1955)	13

Cases—Continued: Page

Irving v. *United States*:
867 F.2d 606 (1st Cir. 1988) 2
909 F.2d 598 (1st Cir. 1990) 11
Judy v. *United States*, 864 F.2d 83 (8th Cir. 1988) 10
Mitchell v. *Maurer*, 293 U.S. 237 (1934) 12
Tippett v. *United States*, 108 F.3d 1194 (10th Cir. 1997) 12
United States v. *Gaubert*, 499 U.S. 315 (1991) 4, 9, 10, 13
United States v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) 13
Wood v. *Bartholomew*, 516 U.S. 1, 8 (1995) 8

Statutes and rules:

Federal Tort Claims Act:
28 U.S.C. 1346(b) (1994 & Supp. III 1997) 2
28 U.S.C. 2671-2680 2
28 U.S.C. 2680(a) 2, 9
Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*:
29 U.S.C. 657(a) 9
Fed. R. App. P.:
Rule 40(a)(1) 6
Rule 41(b) 6
Sup. Ct. R. 13 8

Miscellaneous:

Field Inspection Reference Manual Chapter II-Inspection Procedures, 4 O.S.H. Rep. (BNA) 77:0141 (Sept. 26, 1994) 11

In the Supreme Court of the United States

No. 98-1805

GAIL MERCHANT IRVING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. A1-A67) is reported at 162 F.3d 154. The opinion of the district court (Pet. App. E1-E60) is reported at 942 F. Supp. 1483.

JURISDICTION

The judgment of the court of appeals sitting en banc was entered on December 18, 1998. A petition for rehearing was denied on February 9, 1999 (Pet. App. D1-D2). The petition for a writ of certiorari was filed on May 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1981, petitioner filed this suit in the United States District Court for the District of New Hampshire under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680 (1994 & Supp. III 1997), alleging that negligence by Occupational Safety and Health Administration (OSHA) inspectors in performing plant safety inspections proximately caused her injuries in a workplace accident. Pet. App. E1-E2. Specifically, petitioner alleged that, during general administrative inspections conducted in 1975 and 1978, OSHA compliance officers negligently failed to note and cite an unguarded condition of a die-out machine located near her work station. According to the complaint, these failures proximately caused petitioner's injuries because documentation and citation of this condition would have caused her employer to take corrective action. *Ibid.*

The government moved to dismiss the suit on the ground that the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), barred petitioner's claim. Although the district court initially denied the motion and conducted a trial, it concluded after trial that the discretionary function exception barred the claim and dismissed the action for want of subject-matter jurisdiction. See Pet. App. C10-C11. On appeal, the court of appeals vacated the order of dismissal and directed the district court to reconsider the applicability of the discretionary function exception in light of this Court's decision in *Berkovitz* v. *United States*, 486 U.S. 531 (1988). See *Irving* v. *United States*, 867 F.2d 606 (1st Cir. 1988) (Table).

On remand, the district court concluded that *Berkovitz* did not alter the result and that the action was

barred by the discretionary function exception. See Pet. App. C11. On appeal, the court of appeals again vacated the judgment and remanded the action for a further determination of the applicability of the discretionary function exception, concluding that further analysis and factfinding were necessary to determine what OSHA policy actually required of OSHA compliance officers engaged in inspection activities. See *id.* at G1-G15. The district court, however, held on remand that the government was not negligent, and accordingly entered judgment in its favor. The district court did not address the discretionary function exception. See *id.* at C12. Petitioner appealed, and the court of appeals reversed the district court's negligence finding and vacated the judgment. With respect to the discretionary function exception, which the government had raised as an alternative ground for affirming the judgment, the court held that its prior decision prevented it from passing on that issue without further factfinding. The court again remanded the case. *Id.* at F1-F13.

On remand, the district court concluded that the discretionary function exception did not apply. Finding that the OSHA inspectors had been negligent in not examining the die-out machine or citing it to the employer as a safety violation, the district court held the government liable for the accident. Pet. App. E1-E53. The government appealed, arguing principally that the predicate for liability under the FTCA had not been satisfied because a private person would not be liable to plaintiff under state law in the same circumstances. Gov't C.A. Br. 6-7. The government stated in a footnote that it did "not appeal the [district] court's finding regarding the application of the discretionary function exception," given that the finding was "limited to the specific factual circumstances [that the court]

found existed during the time and [in the] area" at issue. *Id.* at 4 n.1. On April 8, 1998, a divided panel of the court of appeals affirmed the judgment. Pet. App. C1-C4.

2. On June 8, 1998, the full court of appeals, acting *sua sponte*, withdrew the panel opinion and ordered rehearing en banc (see Pet. App. B1) "to review the * * * question of whether the FTCA's discretionary function exception foreclosed the plaintiff's negligent inspection claim." *Id.* at A2. On rehearing en banc, the court first addressed and rejected petitioner's argument that, because the government had not asked the panel to reverse the district court's refusal to apply the discretionary function exception, and in fact had conceded that issue in the district court, the en banc court was precluded from considering the issue. The government, the court pointed out, did not concede the discretionary function defense before the district court; to the contrary, it had "persistently raised" the defense since the beginning of the case. *Id.* at A7-A8. Observing that two earlier panels of the court "had squarely rebuffed the * * * discretionary function defense," the court found that "strong arguments" existed for not applying forfeiture, because the government had "good reason" not to raise the defense yet again on appeal. *Ibid.* The court then resolved the issue by concluding that, at any rate, the discretionary function exception "implicates the federal courts' subject matter jurisdiction," a question that the courts are duty-bound to examine and that neither party can waive or concede. *Id.* at A8-A10.

The court went on to address the merits of the discretionary function defense. Citing *United States* v. *Gaubert*, 499 U.S. 315 (1991), the court stated that the discretionary function exception applies only where two

conditions are satisfied: (1) the conduct at issue must be discretionary; and (2) the exercise of discretion must involve or be susceptible to policy-related judgments. Pet. App. A12. The court found both conditions satisfied. As to the first, the court found that the relevant portion of the Occupational Safety and Health Act "places virtually no constraint on the Secretary's discretion to conduct * * * inspections in any way that she sees fit" (*id.* at A13); that "the legislative rules governing the authority of compliance officers mimic the statute and grant these officials broad discretion over the scope, manner, and detail of general administrative inspections" (*id.* at A14); and, consequently, that general administrative inspections constitute discretionary conduct within the meaning of the FTCA. As to the second, the court observed that "OSHA may legitimately devote its limited enforcement resources to monitoring workplaces and working conditions that pose the most serious threats to worker health and safety" (*id.* at A25); that OSHA inspectors must "make daily judgments about what risks and safety issues most urgently require their attention" (*id.* at A26); and that the inspectors' "day-to-day decisions * * * further OSHA's enforcement policy of ensuring adequate safety in workplaces with a view toward efficient and effective use of limited enforcement resources, and are thus grounded in policy" (*ibid.*). The court thus held that the discretionary function exception barred petitioner's claim.[1]

---

[1] Senior Judge Bownes, joined by Judge Lipez, dissented on the ground that the discretionary function exception did not bar petitioner's action. Judge Bownes argued that the OSHA inspectors lacked discretion in how they conducted the compliance inspections because their superiors already had determined that

The court denied petitioner's subsequent request for rehearing. Pet. App. D1-D2. In doing so, the court explained that "[t]he initial request for rehearing en banc was made, albeit provisionally, by a judge of this court on April[] 20[,] 1998, well before the time for filing a petition for rehearing en banc had expired." *Ibid.* The court therefore concluded that "the en banc court had jurisdiction to proceed" (*id.* at D2), and rejected petitioner's request after finding that her arguments threw "no new light * * * on the matters heard and determined" on rehearing en banc. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is unwarranted.

1. Petitioner first claims (Pet. 15-19) that the grant of en banc review on June 8, 1998, exceeded the authority of the court of appeals because it occurred after the issuance of the mandate and therefore involved a recall of the mandate. Petitioner is mistaken. To begin, the premise of petitioner's argument fails because, so far as the record reveals, the court of appeals never issued the mandate. The panel issued its decision and entered judgment on April 8, 1998. Under the applicable rules, the mandate ordinarily would have issued on June 2, 1998—seven days after the expiration of the time to file a petition for rehearing, which in this case was 45 days. See Fed. R. App. P. 40(a)(1), 41(b); see also *ibid.* ("The court may shorten or extend the time" in which the mandate may issue.). As the court of appeals explained,

---

the inspections must encompass an evaluation of all potential hazards at this particular workplace. Pet. App. A30-A67.

however, in this case a judge of the court made an initial request for rehearing on April 20, 1998, twelve days after the panel had issued its opinion and judgment. Consequently, the court of appeals did not issue the mandate, and no evidence in the record suggests otherwise.[2] Because of this, the order granting en banc review, as its plain terms reveal (see Pet. App. B1-B2), did not entail a recall of the mandate, and the court of appeals, as it rightly explained in denying petitioner's request for rehearing, acted while it had full authority to do so. Even the two dissenters from the en banc decision did "not question the court's authority to call *sua sponte* for en banc review." *Id.* at A31 n.14.

Moreover, even had the court of appeals recalled the mandate in connection with its grant of en banc review, doing so would not have constituted the kind of egregious misuse of judicial power that warrants this Court's exercise of its supervisory powers over the lower federal courts. The courts of appeals possess an inherent power to recall their mandates, subject to review only for abuse of discretion. *Calderon* v. *Thompson*, 523 U.S. 538, 549-550 (1998); *Hawaii Hous. Auth.* v. *Midkiff*, 463 U.S. 1323, 1324 (1983) (Rehnquist, J., in chambers). In this case, as noted, p. 6, *supra*, the mandate ordinarily would have issued on June 2, 1998 absent other actions by the court. The court of appeals granted rehearing en banc on June 8, 1998. Given the short duration between the earliest date on which the mandate could have issued and the date on which the court of appeals granted en banc review, a recall of the mandate would not have been an abuse of dis-

---

[2] A July 23, 1999, telephone inquiry to the First Circuit confirmed that the Clerk's Office has no record of the mandate having issued.

cretion. Cf. *Midkiff*, 463 U.S. at 1324 (Rehnquist, J., in chambers) (recall of mandate "some four months" after court of appeals' opinion on the merits had issued was not an abuse of discretion). Indeed, before June 8, 1998, there could be no reliance on the mandate either by the parties or by others given that the time to seek review by this Court had not yet expired. See Sup. Ct. R. 13.

Calderon does not alter this analysis. In *Calderon*, this Court invoked its supervisory powers to reverse a decision of a court of appeals in which the court had recalled its mandate *sua sponte*. 523 U.S. at 566. The Court did so, however, based on the unique circumstances of the case and the nature of the action in the court of appeals, a habeas petition brought by a state prisoner who had been sentenced to death. Noting that "[t]he promptness with which a court acts to correct its mistakes is evidence of the adequacy of its grounds for reopening the case," the Court pointed out that the recall came 53 days after the mandate had issued and only two days before the prisoner was scheduled to be executed. *Id.* at 552, 548. In the interim, "the executive branch of California's government," through the State's governor, "took extensive action in reliance on the mandate" by considering and denying a request for clemency. *Id.* at 552. The Court concluded that the court of appeals abused its discretion in recalling the mandate under such circumstances, for in doing so it failed adequately to consider both "the * * * vital interests of California's executive branch" (*ibid.*) and "the State's interest in the finality of convictions that have survived direct review within the state court system." *Id.* at 555 (citing *Wood* v. *Bartholomew*, 516 U.S. 1, 8 (1995) (per curiam)). Here, of course, federalism concerns are not implicated and there has been

neither inordinate delay by the court of appeals nor any reliance upon the finality of the panel's decision.

2. Petitioner next argues (Pet. App. A19-A23) that the court of appeals erroneously resolved the discretionary function exception in a manner inconsistent with this Court's precedent. Petitioner's argument is without merit. The FTCA's discretionary function exception, 28 U.S.C. 2680(a), excludes any claim which is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." This Court has articulated a two-prong test to determine whether challenged conduct falls within the discretionary function exception. First, in examining the nature of the challenged conduct, a court must consider whether the action is a matter of choice for the acting employee. See *United States* v. *Gaubert*, 499 U.S. 315, 322 (1991); *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). Second, the discretion involved in the choice of conduct must be grounded in considerations of public policy, whether it be social, economic, or political. See *Gaubert*, 499 U.S. at 323; *Berkovitz*, 486 U.S. at 536-537.

The court of appeals adhered to and correctly applied this standard in ruling on the discretionary function exception. With respect to prong one, the court observed that the relevant portion of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), "places virtually no constraint on the Secretary's discretion to conduct * * * inspections in any way that she deems fit." Pet. App. A13. The court also found that "[t]he relevant regulations * * * explicitly grant compliance officers the same broad discretion enjoyed by the Secretary with respect to such inspections." *Id.* at A16.

Based on those observations, the court concluded that the determination how to conduct an administrative inspection on behalf of OSHA was discretionary conduct "involv[ing] an element of judgment or choice." *Berkovitz*, 486 U.S. at 536; see also *Gaubert*, 499 U.S. at 322 ("The requirement of judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.'") (citation omitted). With respect to prong two, the court pointed out that OSHA inspectors cannot be expected to conduct "painstakingly comprehensive" inspections of every item in every plant. Pet. App. A26. Rather, they must "make daily judgments about what risks and safety issues most urgently require their attention," judgments which "further OSHA's enforcement policy of ensuring adequate safety in workplaces with a view toward efficient and effective use of limited enforcement resources." *Ibid.* The court thus concluded that day-to-day decisions of OSHA compliance officers are an integral part of and grounded in considerations of public policy, namely, OSHA's enforcement policies. These conclusions are correct and in accordance with the standard laid down in *Gaubert* and *Berkovitz*. They also are in accordance with the decisions of the other courts of appeals that have addressed the issue, all of which have concluded that the conduct of OSHA safety inspections falls within the discretionary function exception to the FTCA. See *Daniels* v. *United States*, 967 F.2d 1463 (10th Cir. 1992); *Judy* v. *United States*, 864 F.2d 83 (8th Cir. 1988); *Galvin* v. *United States*, 860 F.2d 181 (5th Cir. 1988); *Cunningham* v. *United States*, 786 F.2d 1445 (9th Cir. 1986).[3]

---

[3] In September 1994, OSHA amended the internal guidelines

3. Petitioner's final contention is that the court of appeals lacked authority to review *sua sponte* the applicability of the discretionary function exception in light of the government's failure to press that issue before the panel, the government's earlier assertions of the defense notwithstanding. Pet. 23. The court of appeals, however, clearly had authority to consider this issue. For one thing, the government had raised the applicability of the exception earlier in the litigation only to have it "rebuffed" (Pet. App. A8) by the court of appeals. See *Irving* v. *United States*, 909 F.2d 598, 601-605 (1st Cir. 1990). The court's decision with respect to the exception thereafter became the law of the case. See Pet. App. A7-A8. In light of this, the court of appeals properly concluded that the government had "good reason" for choosing not to press the point yet again before the panel, and thus that strict application of forfeiture principles to prevent consideration of the issue by the en banc court would be inappropriate.[4]

---

that govern the conduct of safety inspections in a way that reflects this understanding. Under the new guidelines, which apply to all inspections conducted nationwide, an inspection "may be deemed comprehensive even though, as a result of the exercise of professional judgment, not all potentially hazardous conditions, operations and practices within those areas are inspected." *Field Inspection Reference Manual, Chapter II–Inspection Procedures*, 4 O.S.H. Rep. (BNA) 77:0141 (Sept. 26, 1994) (Instruction CPL 2.103). The amended guidelines supersede those that applied to OSHA safety inspectors when the challenged conduct in this case occurred and remove any doubt concerning whether safety inspectors have policy-based discretion regarding how to conduct safety inspections like those at issue here. In doing so, they further detract from the need for review of the decision of the court of appeals.

[4] Contrary to petitioner's representation (see Pet. 9-10), the government did not concede the point in its brief in the court of

Moreover, because the discretionary function exception forms a condition upon the government's waiver of sovereign immunity under the FTCA, the question whether the exception applies is one of subject-matter jurisdiction, a fact that the court of appeals rightly recognized. See Pet. App. A8. The court thus had an affirmative obligation to examine the applicability of the exception on its own initiative to satisfy itself of its jurisdiction to hear the case. See, *e.g.*, *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.") (quoting *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934)); see also, *e.g.*, *Appley Bros.* v. *United States*, 164 F.3d 1164, 1169-1170 (8th Cir. 1999) (applicability of discretionary function exception is a threshold question of subject-matter jurisdiction); *Cohen* v. *United States*, 151 F.3d 1338, 1340 (11th Cir. 1998) (same), cert. denied, 119 S. Ct. 1803 (1999); *Good* v. *Ohio Edison Co.*, 149 F.3d 413, 419 (6th Cir. 1998) (same); *General Dynamics Corp.* v. *United States*, 139 F.3d 1280, 1283 (9th Cir. 1998) (same); *Tippett* v. *United States*, 108 F.3d 1194, 1196-1197 (10th Cir. 1997) (same).

The authorities cited by petitioner for the proposition that the court of appeals lacked authority to address

---

appeals. To be sure, the government did state in the brief that the "failure [of the inspectors to inspect the machine] violated a mandatory policy and, as such, precluded application of the discretionary function exception." Gov't C.A. Br. 4; see Pet. 9-10 (quoting this statement). But the government made that statement merely as part of its summary of the district court's holding, not as an affirmative concession in the court of appeals. Petitioner quotes the statement out of context.

this issue are inapposite. In *United States* v. *Gaubert*, 499 U.S. 315 (1991); *Block* v. *Neal*, 460 U.S. 289 (1983); *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984); and *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), the Court simply observed that the government had not asserted a defense based on the discretionary function exception. The Court did not suggest that a lower court is powerless to ascertain the applicability of the discretionary function exception on its own initiative.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Acting Assistant Attorney General

MARK STERN
PETER R. MAIER
Attorneys

JULY 1999

Supreme Court, U.S.
FILED
AUG 2 1999
OFFICE OF THE CLERK

(3)

No. 98-1805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GAIL MERCHANT IRVING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Matthew B. Cox
Counsel of Record
Paul R. Cox
BURNS, BRYANT, HINCHEY, COX & ROCKEFELLER, P.A.
255 Washington Street
Dover, NH 03821-0608
(603) 742-2332

Leslie A. Brueckner
Arthur H. Bryant
TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.
1717 Massachusetts Ave., NW,
Suite 800
Washington, D.C. 20036
(202) 797-8600

Attorneys for Petitioner

11 99

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES i

ARGUMENT 1

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Berkovitz v. United States,
486 U.S. 531 (1988) 1, 2, 3

Calderon v. Thompson,
118 S. Ct. 1489 (1998) 8, 9

Dalehite v. United States,
364 U.S. 15 (1953) 2

Irving v. United States,
49 F.3d 830 (1st Cir. 1995) 3

Statutes, Rules and Regulations

Federal Rule of Appellate Procedure 41 8

ARGUMENT

Because the government's brief in opposition contains significant mischaracterizations regarding the factual and legal history of this unique case, the petitioner respectfully submits this reply.

1. The Government's Brief in Opposition Incorrectly Concludes that the Court Properly Applied the *Berkovitz* Test.

This Court's seminal decision of *Berkovitz v. United States*, 486 U.S. 531 (1988), establishes a two-prong test for determining when government torts are immunized under the discretionary function exception. First, the court must identify the act complained of and determine if it was a matter of choice for the acting employee. *Id.* at 536. Second, the court must determine if the choice was "grounded in social, economic, and political policy". *Id.* at 537. A negative answer to either exception permits the plaintiff's case to proceed. *Id.* The government's brief in opposition proclaims, without serious analysis, that the court of appeals "adhered to and correctly applied" the *Berkovitz* test. Br. Opp. at 9.

Echoing the error of the court of appeals, the government draws this conclusion without even reaching the first crucial inquiry under prong one of the test -- identifying the act complained of. The act complained of is the defendant's failure to actually inspect (and thus the failure to cite) the machine in question during either of the two pre-accident inspections.

Again mirroring the erroneous analysis of the court of appeals and omitting sincere dialogue, the government

also fails to discuss the next inquiry under prong one of the test -- whether the failure to inspect the machine was a matter of choice. "[C]onduct cannot be discretionary unless it involves an element of judgment or choice". *Id.* at 536. The unchallenged finding of the trial court was that the failure to inspect was due to simple inadvertence (i.e. a mistaken belief by the inspectors that they *had* inspected the machine in question).[1] *There is not a shred of evidence, from any source, which would support the conclusion that the inspectors in this case made a judgment call or a conscious choice not to inspect the machine which injured Ms. Irving.* Where, as here, the act complained of is the result of mistake or inadvertence, rather than a calculated decision "to act according to one's judgment of the best course",[2] "then there is no discretion in the conduct for the discretionary function exception to protect." *Berkovitz*, 486 U.S. at 536.

As to the final inquiry under prong one of the test, the brief in opposition focuses on the general statutory provisions surrounding OSHA inspections and the holdings of other FTCA cases involving OSHA. *See* Br. Opp. at 9-10. In so doing, the brief overlooks an additional and critical aspect of prong one of the test -- was the failure to inspect a matter of choice *for the inspectors themselves? Berkovitz*, 486 U.S. at 536. The general authority granted to OSHA superiors is irrelevant in a case where, as here, ground-level inspectors were given specific instructions to inspect the entire plant, including the machine in question. *See* Pet. App. E13-E15. This is because the inspectors had "no rightful option but to adhere to the directive." *Berkovitz*, 486 U.S. at 536.

---

[1] *See* Pet. at 20-21.

[2] *Dalehite v. United States*, 364 U.S. 15, 34 (1953).

Accordingly, as the dissent said of the en banc majority, the brief in opposition merely "pays lip service to the appropriate focus" required by *Berkovitz*. Pet. App. A-48. Even cursory examination of the opinion of the en banc majority reveals a fundamental misconstruction of *Berkovitz*, thus warranting review by this Court.

2. The Government Was *Not* Legally Precluded From Raising the Discretionary Function Defense in the Instant Appeal; It Simply Made a Conscious and Informed Decision To Waive It.

Ms. Irving's petition points out that the discretionary function issue, now at the heart of this dispute, was formally waived by the government as an appellate issue. Pet. 9-10. Straining credibility to the breaking point, the government now claims that it waived the defense because it was legally precluded from raising it in this appeal. Br. Opp. at 11. A quick chronological review confirms the clear fallacy of this contention.

The government's claim is based on the inaccurate premise that, after rejecting discretionary function arguments in each of the first three appeals, the First Circuit precluded the government from renewing this defense. *Id.* But the First Circuit said exactly the opposite. Following the third appeal, the directive from the First Circuit was that "...the government is free to renew its argument that the inspectors' actions fell within the discretionary function exception ...". *Irving v. United States*, 49 F.3d 830, 837 (1st Cir. 1995)(Pet. App. F-13).

There can be no doubt that the government understood this clear message from the First Circuit for at

least three reasons (in addition to the inherent clarity of the language itself):

1. Shortly after that opinion was issued, the government did just what the First Circuit invited -- it renewed its discretionary function defense in pretrial proceedings before the new district court judge. *See* Defendant's Memorandum of Law in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment (June 29, 1995).[3]

2. Next, at the ensuing trial before Judge McAuliffe, the government again renewed the discretionary function defense. *See* Defendant's Proposed Findings of Fact and Conclusions of Law #11 at 7 (11-21-95)[4](requesting a trial court ruling that Irving's case is barred by the discretionary function exception); *see also* Pet. App. E-32 (trial court rejecting, on the merits, government's "...argument that the discretionary function exception bars Irving's suit entirely.").

3. After judgment was rendered in Irving's favor on August 29, 1996, the government initiated the fourth appeal to the First Circuit (which eventually gave rise to the present appeal to this Court). In its Civil Appeal Pre-Argument Statement dated 12-30-96,[5] under the heading "Issues Proposed to be Raised On Appeal", the

---

[3] For the Court's convenience, copies of the following documents (referred to in this brief) have been lodged with the Clerk's Office:

1. Government's "Brief of Appellant" dated January, 1997
2. Government's "Civil Appeal Pre-Argument Statement" dated 12-30-96
3. Defendant's Proposed Findings of Fact and Conclusions of Law dated 11-21-95
4. Memorandum of Law in Support of Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment dated 6-29-95

[4] *See* note 3, *supra.*

[5] *See* note 3, *supra.*

government listed three issues, the first being "Whether the claim is barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a)".

It was only after this third failed attempt to escape under the discretionary function exception that the government decided to formally abandon the defense. *See* Part 3 *infra*. One need not wonder whether the government was precluded from raising the discretionary function issue in the aftermath of the third appeal to the First Circuit when, as shown above, the government did in fact raise the defense on at least three separate occasions before deciding to concede it. Thus, the government's current contention is belied by its own conduct earlier in the case.

3. There Can Be No Dispute That the Government Explicitly and Knowingly Waived the Discretionary Function Defense in Its Underlying Appeal to the First Circuit.

The government's brief in opposition next attempts to deny that the government waived the discretionary function issue for the purposes of this appeal. Br. Opp. at 11-12, note 4. This denial represents another unfortunate breach of candor.

Within a month of filing the Civil Appeal Pre-Argument Statement designating the discretionary function question as one of three appellate issues, the government filed its "Brief of Appellant" with the First Circuit. Unlike the Pre-Argument Statement, the brief lists only one "Issue For Review", the so-called "good Samaritan" issue. [6] *See*

[6] In its current brief to this Court, the government cleverly suggests that its "principal" argument in the January, 1997 brief concerned the good Samaritan issue. Br. Opp. at 3. In fact, the good Samaritan issue was

Government Brief of January 1997,[7] at 1 ("Whether the United States, if a private person, would be liable to the plaintiff under similar cicumstances [sic] under the law of New Hampshire"). The other two issues which had been designated just a month before (the discretionary function exception and the misrepresentation exception) were unequivocally abandoned.

We know that the government did not simply overlook the discretionary function issue because its brief explicitly states that it had chosen not to raise the discretionary function issue on appeal.

> ... *the United States does not appeal the court's finding regarding the application of the discretionary function exception to this case. Id.* at 4-5, note 1 (emphasis supplied).

The government even took care to explain why, after 17 years of stubbornly asserting this defense, the concession was being made. The reason was *not*, as the government now claims, that it was legally precluded from continuing to raise the discretionary function exception. The concession was made:

> [b]ecause the district court's finding is limited to the specific factual circumstances it found existed during the time and area covered by Mr. Amirault's [the OSHA Area Director] testimony .... *Id.*

In other words, the government made a calculated decision that its interests were better served by not elevating this issue to the court of appeals level.

---

the *only* argument raised in that brief. The brief does not contain any argument whatsoever concerning the discretionary function exception.

[7] *See* note 3, *supra*

With this backdrop, it is absurd for the government to state, as it has done in its current brief to this Court, that the concession is "quote[d] ... out of context". Br. Opp. at 11-12, note 4. There is no other context in which to put the phrase "the United States does not appeal ... the discretionary function exception." The government had the freedom to determine which appellate issues to raise and which to abandon, guided presumably by principles of good faith and candor toward the tribunal. The government chose to abandon the discretionary function defense, and the above phrase was clearly designed to put the court and the plaintiff on notice of the concession and, thus, the fact that the issue would not be discussed in the brief.[8]

4. Contrary to the Government's Contention, the *Sua Sponte* Order of June 8, 1999 Did Constitute a Recall of the Mandate.

The government contends that, in the aftermath of the April 8, 1998 panel decision in favor of Irving, the mandate never issued. Br. Opp. at 6. Thus, the government claims, the First Circuit retained jurisdiction to "withdraw" the decision, *sua sponte*, two months later. As a preliminary matter, one wonders how (after 19 years, two trials, four appeals, an explicit government waiver, and no post-judgment request for reconsideration) a *sua sponte* "withdrawal" two months after the final decision is somehow less unfair to Gail Irving than a *sua sponte* "recall" two months after the final decision. In any event, the Federal Rules of Appellate Procedure clearly confirm that the mandate was *required*[9] to issue on June 2, 1998,

---

[8] *See supra* note 6.

[9] Under Rule 41, the issuance of the mandate on the prescribed date is mandatory. Fed. R. App. P. 41 (b)("mandate *must* issue 7 days after

and thus the June 8 recall came several days *after* the mandatory issuance of the mandate. Given this undisputed fact, the government's argument is one of semantics, and the June 8, 1998 order must be considered at least a de facto recall of the mandate.

In light of the above, the government's representation (that the clerk of the First Circuit apparently confirmed, via telephone, that it has no record of a mandate having issued), Br. Opp. at 7, note 2, merely reflects further error on the part of the First Circuit. The Rules required that the mandate be issued on June 2, 1998, or that the court issue an order extending the Rule 41 deadline, but apparently neither happened. Under such circumstances, the en banc order of June 8, 1998 must be evaluated in the same way as an actual recall of the mandate. After two decades of litigation, the fate of Ms. Irving should not be reduced to a semantics game regarding how best to label a recall which, everyone agrees, came two months after the judgment in her favor and at least 6 days after the mandatory date for issuance of the mandate.

The *Calderon* analysis suggests the same conclusion. *Calderon v. Thompson*, 118 S. Ct. 1489 (1998). *Calderon* set forth the stringent standard for the recall of a mandate and reversed the Ninth Circuit's recall in the underlying case. The opinion compels the same result in a case like the present which, but for an unlawful failure to observe the requirements of Rule 41, would have concerned a recall procedurally identical to that in *Calderon*. Significantly, *Calderon* held that the standard *is never met by court oversight in failing to call for review*

..."](emphasis supplied). Although the prescribed date may be extended by court order, *Id.*, no such order has ever been issued in this case, either before or after the fact.

within the stated deadline, especially when the only consequence is an inability to conduct en banc review of a case already reviewed by a panel. *Id.* at 1499. Citing a "deep rooted policy in favor of the repose of judgments", *Id.*, the *Calderon* Court stated that such a recall is improper "[e]ven if [it] were a case *implicating no more than ordinary concerns of finality.*" *Id.* at 1498. (emphasis supplied).[10]

5. The Government's Discussion of this Waiver of the Discretionary Function Exception, and the Effect of Same on the Court of Appeals, Misstates the Plaintiff's Argument.

The government having clearly waived the discretionary function defense, the question arises as to whether, notwithstanding the waiver, the First Circuit was "nonetheless bound to consider it" *sua sponte*. Pet. App. A-8, A-9. The government once again misstates the petitioner's argument. Br. Opp. at 12. The petitioner's claim is that the First Circuit violated the teachings of this Court in holding that it was *required* to raise the issue *sua sponte* notwithstanding the government concession. *See* Pet. 24-25 (discussing many cases in which this Court has accepted government concessions of the discretionary function exception). This legal error was critically prejudicial to Ms. Irving because, after all, the clear implication of the majority opinion is that, after "two decades of needlessly protracted litigation", Pet. App. A-28, it would not have recalled the judgment in her favor absent

[10] As to the issue of finality, there is no dispute that (a) a judgment for Ms. Irving was entered on April 8, 1998, and (b) the government's time limit for requesting any post-judgment relief from the First Circuit had expired as of the time of the *sua sponte* recall.

the (erroneous) belief that it had a binding obligation to do so.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that the writ of certiorari should be granted.

Respectfully submitted,

Matthew B. Cox
counsel of record
Paul R. Cox
Burns, Bryant, Hinchey,
Cox & Rockefeller, P.A.
P.O. Box 608
Dover, NH 03821-0608
(603) 742-2332

Leslie A. Brueckner
Arthur H. Bryant
Trial Lawyers for Public
Justice, P.C.
1717 Massachusetts Avenue, N.W.,
Suite 800
Washington, D.C. 20036
(202) 797-8600

August 2, 1999

Attorneys for Petitioner